United States Court of Appeals

for the Second Circuit

APPENDIX

74-1160

Original

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

DAIRYLEA COOPERATIVE, INC.,

Plaintiff-Appellant,

-against-

EARL L. BUTZ, Secretary of the Department of Agriculture of the United States,

Defendant-Appellee,

PENNMARVA DAIRYMEN'S COOPERATIVE FEDERATION, INC.,

Intervenor-Appellee.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DISMISSING APPELLANT'S COMPLAINT

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
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Docket Entries

JUDGE CARTER

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

72 CIV. 4653

Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
DAIRYLEA COOPERATIVE, INC. VS EARL BUTZ, SECRETARY OF THE DEPARTMENT of AGRICULTURE OF THE UNITED STATES --- PENNMARVA DAIRYMEN'S COOPERATIVE FEDERATION INC., Intervenor	For plaintiff: BOTEIN, HAYS, SKLAR & HERZBERG 200 Park Ave. 10017 TN 7-5500 (EARL BUTZ Sectry of Dept) For defendant: WHITNEY NORTH SEYMOUR U.S. ATTONREY So. District of N.Y. N.Y. N.Y. 10007 SIMPSON THACHER & BARTLETT 1 Battery Park Plaza New York, N.Y. 10004 483-9000 (For Intervenor)

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
S. 5 mailed X	Clerk		11/1/72	Botein, H-	15 —	
			11/3/72	45 Sklar		15 —
S. 6 mailed ✓	Marshal		11/7/72	Butler	5 —	
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ction arose at:	Depositions					

Docket Entries

DAIRYLEA COOPERATIVE, INC. VS SECTY. OF DEPT OF AGRICULTURAL OF THE U.S.

JUDGE CARTER

72 CIV. 46

DATE	PROCEEDINGS	Date Or Judgmen
Nov.1-72	Filed complaint and issued summons	
Dec.11-72	Filed Transcript of proceedings, dated 11-3-72	
Nov.10-72	Filed summons & marshals return deft served on 11-2-72 by U.S.M. Robert Tom.	
Dec.19-72	Filed DEFTS ANSWER TO THE COMPLAINT.	W.N.
Dec.19-72	Filed Applicant for intervention Pennmarva Dairymen's cooperative Federation Inc., affdvt & notice of motion for leave to intervene as a deft. ret:12-29-72	
Dec.26-72	Filed Pltffs affdvt in opposition to the motion of Pennmarva Dairymen Cooperative Fed. Inc. to intervene in this action as a deft.	
Dec.26-72	Filed Pltffs memorandum of law in opposition.	
Jan.2-73	Filed Defts Notice to take deposition.	
Jan.2-73	Filed Applicant for Intervention Pennmarva Dairymen's cooperative Fed Inc brief.	
Jan.2-73	Filed Defts affdvt in support of the application for intervention by Pennmarva Dairymen's Cooperative Fed Inc.,	
Jan.2-73	Filed Defts memorandum in support of motion to intervene.	
Jan.2-73	Filed MEMO ENDORSED on motion filed 12-19-72 for leave to intervene Motion GRANTED. So Ordered 12-29-72 (mailed notice) CARTER, J.	
Jan.9-73	Filed Intervenor's request for admission under rule 36.	
Jan.9-73	Filed Intervenor's ANSWER TO THE COMPLAINT.	S.T.
Jan.23-73	Trial begun before CARTER, J. non-jury.	
Jan.24-73	Trial continued & concluded. Judges Decision Reserved. CARTER, J.	
Jan.31-73	Filed letter from Asst U.S. Atty Pamela Davis addressed to John Livingston Clerk. about contents of a carton that contains joint exhibits from the trial.	
Feb.7-73	Filed Intervenor's post trial memorandum of law.	
[illegible]-73	Filed transcirpt of record of proceedings dated 1/24,23/73.	
Nov-19-73	Filed Opinion #10021..For all the reasons indicated in this Opinion, the Court is persuaded that the complaint must be dismissed. The foregoing constitutes the court's Findings of fact and conclusions of law. -- Carter, J. (n/n) (N)	
Nov-26-73	Filed Judgment and order that defendants have judgment against the plaintiff dismissing the complaint. - Clerk.	
Dec-27-73	Filed pltffs notice of appeal to the USCA for the 2nd Circuit from judgment entered on 11-26-73 - copies mailed to U.S. Atty. and Simpson Thacher & Bartlett, Esqs.	
[illegible]-74	Filed Stip. between attys that all exhibits be made part of the record on appeal.	
1-29-74	Filed Statement in response to intervenor's request for admissions served on Jan. 8, 1973	
1-29-74	Filed Pltff's preliminary reply memo of law Re:Jurisdiction	
1-29-74	Filed Pltff's Post Trial Memo and proposed findings of fact and conclusions of law.	
2-4-74	Filed Statemant in response to Interverors request for admission [illegible] served 1-8-73	
2-4-74	Filed pltff's Preliminary reply memo of law Re:Jurisdiction.	
2-4-74	Filed pltff's Post Trial Memo and Proposed Findings of fact & Conc. of Law.	

Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

DAIRYLEA COOPERATIVE, INC.,

Plaintiff,

-against-

EARL BUTZ, SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF THE UNITED STATES,

Defendant.

----------X

COMPLAINT

1972 Civ. No.

Plaintiff, Dairylea Cooperative, Inc., by its attorneys, Botein, Hays, Sklar & Herzberg, for its complaint alleges:

1. (a) This action arises under the Agricultural Marketing Agreement Act of 1937, as amended, 50 STAT 246, 7 U.S.C. 601 et seq. (hereinafter referred to as the Marketing Act);

(b) The amount in controversy exceeds $10,000.

FIRST CLAIM FOR RELIEF

2. Plaintiff is a cooperative association of dairy farmers duly organized under the laws of the State of New York with its principal place of business in the County and City of New York.

3. Defendant is the Secretary of Agriculture of the United States.

Complaint

4. Plaintiff's members are dairy farmers who are located throughout the states of New York, New Jersey, Pennsylvania and elsewhere. Plaintiff has been determined by the Secretary under Marketing Orders 2 and 4 hereinafter mentioned: (a) to be qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the Capper-Volstead Act, (b) to have full authority in the sale of milk of its members and to be engaged in making collective sales of and marketing milk and milk products for its members, and (c) to have its entire activities under the control of its members.

5. The Marketing Act authorizes the Secretary to promulgate regulations called Marketing Orders to govern the marketing of milk in marketing areas of the United States to be designated by him. There are three basic statutory requirements with which any marketing order issued under the Marketing Act must comply:

(i) The prices to all producers under the order must be uniform subject only to certain specified and economically justifiable differentials (Section 608c(5)(B);

(ii) The order must not impose trade barriers against the entry of milk and must guarantee free access to the market for all producers whether theretofore delivering to the market or not (Section 608c(5)(G), and

(iii) The order can do no more to a producer

newly entering the market than to limit the price to him in a specific manner spelled out in the Act and then only for a period not to exceed three months (Section 608c(5)(D).

6. The controversy here relates to Marketing Order 4 promulgated by the Secretary in 1970. It covers marketing in the District of Columbia, the State of Delaware and certain counties in the States of Maryland, Virginia, Pennsylvania and Southern New Jersey - basically Philadelphia, Baltimore and Washington, D.C.

7. The Secretary has also promulgated Order 2 covering the marketing of milk in New York and Northern New Jersey.

8. Plaintiff has for some time been marketing under Orders 2 and 4 milk produced by its members. As the Secretary found in his decision of May 18, 1970 promulgating Order 4, 35 Fed. Reg., p. 7937:

> "Because there is a close interrelationship between the Order 4 and Order 2 markets and they do draw to a considerable extent upon a common supply area, producers should not be unduly inhibited from shifting between the markets."

9. The basic features of the pricing structure under both Orders 4 and 2 are as follows: milk sold by all producers to handlers regulated by the particular Order is divided into classes based on the handlers' use. Milk sold

for fluid use carries the highest price -- Class I; milk used to manufacture dairy products, is assigned a lower price - Class II. These class prices are announced each month by a market administrator who is appointed by defendant to administer the Order. There is a separate market administrator for each of the Orders.

10. Under each Order the aggregate amount of milk used monthly in each of the classes by all handlers under the order is determined, and then multiplied by the applicable class prices. The total is then divided by the total number of pounds of milk in both classes. The resulting number (subject to certain adjustments) is the uniform price.

11. Each producer (or if a member of a qualified cooperative, the cooperative) is entitled to receive this uniform price (subject to certain adjustments) for the pounds of milk delivered by him to handlers under the respective order, regardless of the use made of the milk by the particular handler to whom the producer sold his milk. The handler however pays for the milk delivered to him based on his class use; and any difference between the prices so payable and the uniform price paid to the producers delivering milk to him, is adjusted through a fund - the Producer Settlement Fund - maintained under the particular Order.

Complaint

12. Order 4 contains however a further provision which affects the amounts received by the producer (or his cooperative). These provisions, sections 1004.90 through 1004.96 (known as the Base and Excess plan) are the subject of this action.

13. Under the Base and Excess plan of Order 4 the total number of pounds of milk delivered by a producer is divided into two categories, namely "base" milk on the one hand and "excess" milk on the other. For "base" milk, the producer (or his cooperative) receives a higher price; for "excess" milk, a lower price.

14. Generally speaking a producer's base under Order 4 is determined for a 12 month period beginning on March 1 on the basis of his average daily deliveries of milk to Order 4 handlers in the months of August through December of the prior year.

15. The prices for base and excess milk under Order 4 are arrived at as follows:

Excess milk is assigned to Class II and priced at the lower Class II value. Base milk receives a higher price determined by subtracting from the total value of all the milk in the pool (both Class I and Class II milk), the amount of excess milk at the Class II price. The price for base milk is thus a blend of all of Class I

and only so much of Class II milk as is not assigned to excess milk. The base price is much higher in every month than the excess price.

16. Under the Marketing Act base-excess plans may be used only to level the pattern of seasonal production and not to limit the amount of production or the access of new producers to the market. However, under the guise of the base-excess plan the Secretary has promulgated provisions in Order 4 which violate the Marketing Act's basic requirements of uniformity of price to producers, erect illegal trade barriers, illegally discriminate against plaintiff and its members and otherwise are in violation of law.

17. Plaintiff has for some years supplied the milk requirements of Johanna Farms, Inc., a handler located in Flemington, New Jersey, who is subject to regulation under Order 4. As the business of the Flemington handler grew so did its milk requirements, and plaintiff sought to meet the handler's increased needs. In the months of May, June and October 1972, it became necessary for plaintiff to shift to the Flemington handler milk produced by its members previously regulated and priced under Order 2 with the result that such milk became subject to pricing under Order 4.

18. These producers thereby became subject to the

base and excess plan of Order 4 and having made no deliveries recognized by Order 4 to an Order 4 handler during the period of August through December 1971, had no qualifying base under Order 4 based on their own production in that period - their production under Order 2 not being recognized by Order 4. They were arbitrarily assigned a low base as new producers (this term is used herein to include established producers not previously shipping into the Order 4 market) as provided in paragraph (e) of §1004.92 which is considerably less than their daily average deliveries taking into account their deliveries to Order 2 handlers during the base forming period. The arbitrary bases assigned by Order 4 to plaintiff's producers who were shifted were very much lower than their proper historical bases if based on their marketing of milk under Order 2 as well. The difference in dollars for plaintiff's producers who shifted in May and June is about $12,000 for the months of May through September 1972. The differences for all the plaintiff's producers for October 1972 and ensuing months cannct be exactly determined as yet because the base and excess prices have not yet been announced nor the deliveries of milk of the producers in question made but the amount involved is estimated at $65,000 per month.

19. Plaintiff's producers are being illegally deprived by Order 4 of their historical bases for deliveries under Order 2 notwithstanding that the economic value of

their levelling of their seasonal production is just as great whether they were producers under Order 2 or Order 4.

20. The pattern of administrative record keeping and verification under Order 2 is in all relevant respects the same as that under Order 4. There is detailed record keeping and reporting by handlers under both orders; and from these records the deliveries by these producers during the August-December 1971 base period under Order 2 could be readily ascertained and verified. There is no legal basis for the arbitrary disregard of these deliveries under the Base-Excess provisions of Order 4.

21. Under the provisions of Order 4, the above plaintiff's producers whose milk is currently being shipped under Order 4 will not, until March 1, 1973 receive true bases - i.e., based upon their own historical deliveries during the prior August through December period. Instead, Order 4 until March 1, 1973 arbitrarily assigns them discriminatory and economically punishing bases (see §1004.92(e)). Instead of getting their proper historic base of about 90%, they will get for milk delivered during the months of October and November 1972 a base of only 70% and for milk delivered in December 1972, and January and February 1973, still less - only 60%.

22. Contrary to the clear mandate of the Marketing Act (paragraph D of §608c(5) limiting any penalty on new producers to three months, plaintiff's producers who shifted in May 1972 are being penalized for 10 months, those who

shifted in June 1972 for 9 months and those who shifted in October 1972 for 5 months. Furthermore the period for which under any possible order of the Secretary penalty pricing might be imposed on the plaintiff's Honesdale producers has long since been expired. They have for more than a year been regular shippers of milk to the Order 4 marketing area. Part of the receipts of the Honesdale plant were at all pertinent times regularly shipped to an Order 4 handler who distributed milk in the Order 4 marketing area. Although the amounts shipped were not sufficient to bring the Honesdale plant under regulation by Order 4 prior to October 1, 1972, nevertheless such producers were regularly selling milk for consumption in the Order 4 marketing area within the meaning of paragraph D of §608c(5) of the Marketing Act.

23. Plaintiff and its members will suffer irreparable injury unless this Court enjoins the enforcement of said provisions of Order 4.

SECOND CLAIM FOR RELIEF

24. The allegations of paragraph 2 through 23 are realleged.

25. Prior to October 1972 certain of plaintiff's producers shipped their milk to a plant maintained by plaintiff at Honesdale, Pennsylvania at which all milk

handled was subject to Order 2. No milk was or is bottled and distributed from the plant but it simply ships raw bulk milk to a distributing plant.

26. Commencing October 1, 1972 the Honesdale plant began to ship substantially all its milk to the Flemington plant of Johanna Farms, Inc. in quantities sufficient to bring the Honesdale plant under Order 4 regulation pursuant to §1004.7(b) of Order 4. As a result the producers delivering to the Honesdale plant (previously regulated as a bulk tank unit under Order 2) became producers under Order 4.

27. Paragraph (d) of §1004.92 provides that if a distributing plant becomes an Order 4 pool plant under such circumstances a producer delivering to the plant immediately gets a current base for his deliveries based on the historical deliveries made by him during the prior base forming period to such plant either as an Order 4 or as a non-Order 4 plant.

28. In the Secretary's decision of May 18, 1970 promulgating Order 4 the Secretary made the following findings:

> "A supply plant, the milk supply from which is needed in the short production months, is an integral part of the marketing supply [of Order 4]."
> (35 Fed. Reg. p. 7928)

Complaint

"The Delaware Valley Market [part of Order 4] traditionally was supplied largely through supply plants." (35 Fed. Reg. p. 7935)

29. There is no basis in law for denying the same treatment to producers shipping to a non-Order 4 supply plant which becomes an Order 4 plant as is accorded to producers in the case of a distributing plant so shifting.

THIRD CLAIM FOR RELIEF

30. The allegations of paragraphs 2 through 29 (other than paragraph 24) are realleged.

31. The plaintiff's producers who shifted in May and June 1972 and part of those who shifted in October 1972 were producers delivering to a bulk tank unit (the Salem bulk tank unit) previously regulated by Order 2. The milk of such bulk tank unit since October 1, 1972 is being delivered directly to Johanna Farms' Flemington plant (which is regulated by Order 4) by tank truck which picks the milk up at the producers' farms and delivers it to the Flemington plant without intermediate reloading.

32. Such a bulk tank unit is in fact the economic equivalent of a supply plant. This has been recognized by the Secretary under Order 2 and provisions are made in such order for treating such units substantially as supply plants, and similar provisions are made under Order 4 as to

cooperatives operating such routes.

33. The same consideration which makes illegal and arbitrary the exclusion of producers delivering to supply plants from paragraph (d) of §1004.76 make illegal the exclusion of producers who delivered to an Order 2 bulk tank unit.

FOURTH CLAIM FOR RELIEF

34. The allegations of paragraphs 2 through 33 (other than paragraphs 24 and 30)are realleged.

35. There is no evidence in the hearing record on the basis of which Order 4 was promulgated to support the provisions of Order 4 herein challenged.

36. The adoption of a base-excess plan for levelling production under Order 4 in contrast with the Louisville plan of levelling seasonal production adopted by the Secretary under Order 2 which shares a common milkshed with Order 4 was for the purpose of inhibiting the movement of producers from Order 2 to Order 4.

37. These provisions of Order 4 discriminate unlawfully against plaintiff and its members, constitute a trade barrier and are otherwise in conflict with the provisions of the Marketing Act, and the Fifth Amendment to the Constitution of the United States.

Complaint

WHEREFORE, plaintiff prays:

(a) for a judgment declaring invalid the Base Excess Provisions of Order 4;

(b) alternatively declaring invalid the provisions of Order 4 denying to plaintiff's members a base on the basis of their historical deliveries of milk whether to Order 4 or non-Order 4 handlers during the prior base forming period of August through December;

(c) that a preliminary and permanent injunction issue enjoining defendant, his agents, servants, employees and attorneys (including the Market Administrator under Order 4) from enforcing the Base Excess Provisions of Order 4 in any manner other than so as to accord to plaintiff's members a base for the said milk based upon their historical deliveries in August through December 1971 to handlers whether regulated by Order 4 or not; and

(d) that the Court grant such other and further relief, preliminary and final, as may be necessary, just and proper.

Dated: New York, N.Y.
October 31, 1972

BOTEIN, HAYS, SKLAR & HERZBERG
Attorneys for plaintiff

By Sydney C. Winton
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Defendant's Answer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAIRYLEA COOPERATIVE, INC.,	:	
Plaintiff,	:	
-v-	:	ANSWER
EARL L. BUTZ, SECRETARY OF AGRICULTURE OF THE UNITED STATES,	:	72 Civ. 4653 R.L.C.
Defendant.	:	

Defendant, Earl L. Butz, Secretary of Agriculture of the United States, by his attorney, Whiney North Seymour, Jr., United States Attorney for the Southern District of New York, for his answer to the complaint, alleges:

1. Admits each and every allegation contained in paragraphs "1", "2", "3", "4", "6", "7", "25" and "26" of the complaint herein.

2. With respect to the allegations contained in paragraph "5", respectfully refers to the Agricultural Marketing Agreement Act of 1937, as amended ("the Act"), for the true and correct terms and provisions thereof.

3. Admits each and every allegation contained in the first sentence of paragraph "8" of the complaint herein. With respect to the rest of said paragraph "8",

respectfully refers to the entire decision of May 18, 1970 for the true and correct terms and provisions thereof.

4. With respect to the allegations contained in paragraphs "9," "10", "11", "12", "13", "14", "15" and "27" of the complaint herein, respectfully refers to Orde 2 and Order 4 for the true and correct terms and provisions thereof.

5. Denies each and every allegation contained in paragraphs "16", "18", "19", "20", "21", "22", "23", "29", "32", "33", "35", "36" and "37" of the complaint herein, and respectfully refers to the Act, Order 2 and Order 4 for the true and correct terms and provisions thereof.

6. Denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "17" of the complaint herein, except admits and alleges that milk of certain producers who are members of the plaintiff cooperative was received by Johanna Farms, Inc., in the months of May, June and October, 1972.

7. As and for his answer to paragraph "24" of the complaint herein, repeats and realleges his responses to paragraphs "2" through "23" of the complaint herein with the same force and effect as if said responses were fully repeated and realleged at length herein.

Defendant's Answer

8. With respect to the allegations contained in paragraph "28" of the complaint herein, respectfully refers to the entire decision of May 18, 1970, for the true and correct terms and provisions thereof.

9. As and for his answer to paragraph "30" of the complaint herein, repeats and realleges his responses to paragraphs "2" through "23" and "25"through "29" of the complaint herein with the same force and effect as if said responses were fully repeated and realleged at length herein.

10. Denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "31" of the complaint herein.

11. As and for his answer to the allegations contained in paragraph "34" of the complaint herein, repeats and realleges his responses to paragraphs "2" through "23", "25" through "29" and "31" through "33" of the complaint herein with the same force and effect as if said responses were fully repeated and realleged at length herein.

FIRST AFFIRMATIVE DEFENSE

12. This Court lacks subject matter jurisdiction.

Defendant's Answer

SECOND AFFIRMATIVE DEFENSE

13. The complaint fails to state a claim upon which relief can be granted.

WHEREFORE, defendant Earl L. Butz, Secretary of Agriculture of the United States, demands that judgment be entered dismissing the complaint herein, together with the costs and disbursements of this action.

Dated: New York, New York

December 19, 1972

WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the
Southern District of New York
Attorney for Defendant

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Pennmarva Dairymen's Cooperative Federation, Inc.'s Motion to Intervene as Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAIRYLEA COOPERATIVE, INC., Plaintiff, -against- EARL L. BUTZ, SECRETARY OF AGRICULTURE OF THE UNITED STATES Defendant, PENNMARVA DAIRYMEN'S COOPERATIVE FEDERATION, INC., Applicant for Intervention	:	NOTICE OF MOTION TO INTERVENE AS A DEFENDANT 72 Civ. 4653 R.L.C.

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavits of Paul E. Hand sworn to on December 7, 1972, and December 12, 1972, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court on December 29, 1972, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard, before the Hon. Robert L. Carter, in Room 129, United States Court House, Foley Square, City, County, and State of New York, pursuant to Rule 24, on behalf of Pennmarva Dairymen's Cooperative Federation, Inc., individually and on behalf of its individual members, Inter-State Milk Producers' Cooperative, Maryland Cooperative Milk Producers Incorporated and Maryland and

Pennmarva Dairymen's Cooperative Federation, Inc.'s Motion to Intervene as Defendant

Virginia Milk Producers Association, Inc., for leave to intervene as a defendant in this action, in order to assert the defenses set forth in its proposed answer, of which a copy is hereto attached, on the ground that approximately 4500 of its farmer members who market approximately 60% of the milk supplied to the area encompassed within Federal Marketing Order 4 are directly affected by the base-excess plan alleged in the complaint to be an infringement of Plaintiff's rights, its legal interests and those of its farmer members will be affected by the judgment, which legal interests are not now adequately represented in the action, and as such has a defense to Plaintiff's claim presenting both questions of law and of fact which are common to the main action.

Dated: New York, New York
December 18, 1972

SIMPSON THACHER & BARTLETT

By _____
A Member of the Firm

Attorneys for Pennmarva,
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Federation, Inc.
Applicant for Intervention
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Pennmarva Dairymen's Cooperative Federation, Inc.'s Motion to Intervene as Defendant

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New York, N.Y. 10007
Attorney for Defendant

Affidavit of Paul E. Hand, Sworn to December 7, 1972, in support of Motion to Intervene

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAIRYLEA COOPERATIVE, INC.,

Plaintiff,

1972 Civ. No. 4653

-against-

EARL L. BUTZ, SECRETARY OF AGRICULTURE OF THE UNITED STATES

Defendant,

AFFIDAVIT IN SUPPORT OF MOTION TO INTERVENE

PENNMARVA DAIRYMEN'S COOPERATIVE FEDERATION, INC.,

Applicant for Intervention

COMMONWEALTH OF PENNSYLVANIA: SS.
COUNTY OF PHILADELPHIA :

PAUL E. HAND, being duly sworn according to law, deposes and says:

1. He is the Secretary of Pennmarva Dairymen's Cooperative Federation, Inc., (hereinafter "Pennmarva") and as such, is duly authorized to make this affidavit on its behalf.

2. Pennmarva is an agricultural cooperative organized under the laws of the State of Maryland with its principal office at 1717 Gwynn Oak Avenue, Baltimore, Maryland.

Affidavit of Paul E. Hand, Sworn to December 7, 1972, in support of Motion to Intervene

3. The individual members of Pennmarva are Inter-State Milk Producers' Cooperative, Maryland Cooperative Milk Producers Incorporated, and Maryland and Virginia Milk Producers Association, Inc.

4. Approximately 60% of the milk marketed in the area comprising Federal Milk Marketing Order Number 4 is produced and marketed by approximately 4500 dairy farmers who are members of Pennmarva and its individual cooperative members.

5. Pennmarva, its individual cooperative members and the dairy members of said Cooperatives are directly affected by the base-excess plan of Federal Milk Marketing Order Number 4, here under attack, in that said plan levels production in the market, promotes orderly marketing conditions and has a substantial impact upon their income and well-being to the extent that the granting of Plaintiff's prayer for relief may cause disorderly marketing conditions to arise which could result in irreperable harm and financial loss to the dairy farmers associated with Federal Milk Marketing Order Number 4.

6. Penmarva and its individual cooperative members seek to intervene in the subject action in order to be afforded an

Affidavit of Paul E. Hand, Sworn to December 7, 1972, in support of Motion to Intervene

opportunity to place before the Court its position and the position of its 4500 members in the light of the fact that they will be directly affected by the judgment of the Court.

7. Pennmarva expects to present a defense to Plaintiff's claim presenting both questions of law and of fact which are common to the main action.

Paul E. Hand
PAUL E. HAND

Sworn to and subscribed
before me this 7th day
of December, 1972.

Rita Callahan
Notary Public
My Commission Expires October 27, 1975

Proposed Intervenor's Answer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAIRYLEA COOPERATIVE, INC.,

Plaintiff, 1972 Civ. No. 4653

-against-

EARL L. BUTZ, SECRETARY OF AGRICULTURE OF THE UNITED STATES

Defendant, INTERVENOR'S ANSWER

PENNMARVA DAIRYMEN'S COOPERATIVE FEDERATION, INC.,

Intervenor

FIRST DEFENSE

The complaint shows on its face that the court lacks jurisdiction in that the controversy described therein is one within the exclusive jurisdiction of the Secretary of Agriculture, created and acting pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, Title 7, Section 608c(15) (A), United States Code, and the plaintiff has not exhausted its remedies granted by said Agricultural Marketing Agreement Act in that plaintiff has not filed a written petition with the Secretary of Agriculture pursuant thereto.

SECOND DEFENSE

The complaint fails to state a claim against defendant upon which relief can be granted.

THIRD DEFENSE

1. Intervenor admits the allegations contained in para-

graphs 1, 2, 3, 4, 6, 7 of the complaint.

2. Intervenor alleges that the allegations contained in paragraphs 9, 10, 11, 12, 13, 14, 15, 20 of the complaint are an attempt to paraphrase the provisions of Orders 2 and 4, which Orders speak for themselves, and are the best evidence of their provisions, and insofar as any responsive pleading may be deemed to be required, such allegations are denied.

3. Intervenor alleges that the allegations contained in paragraphs 5, 27, 28, 32 attempt to interpret in a misleading manner the Agricultural Marketing Agreement Act, Federal Milk Marketing Orders 4 and 2 and the Findings of the Secretary leading to the promulgation of said Orders, all of which speak for themselves, and insofar as any responsive pleading may be deemed to be required, such allegations are denied.

4. Intervenor alleges it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 17, 18, 22, 25, 26 of the complaint.

5. As to paragraph 8 of the complaint, Intervenor admits that "plaintiff has for some time been marketing under Orders 2 and 4 milk produced by its members" but alleges that the rest of the allegations contained in said paragraph attempt to interpret in a misleading manner the Findings of the Secretary leading to the promulgation of Order 4, which speaks for itself, and insofar as any responsive pleading may be deemed to be required, such allegations are denied.

Proposed Intervenor's Answer

6. As to paragraph 16 of the complaint, Intervenor alleges that the allegation "Under the Marketing Act base-excess plans may be used only to level the pattern of seasonal production and not to limit the amount of production or the access of new producers to the market" is an attempt to interpret in a misleading manner the Agricultural Marketing Agreement Act, which speaks for itself, and insofar as any responsive pleading may be deemed to be required, such allegations are denied; and denies each and every other allegation contained in said paragraph.

7. As to paragraph 21 of the complaint, Intervenor denies the allegations as stated and avers that plaintiff's producers will receive the bases provided under the Order and plaintiff's decision to place the subject milk in Order 4 as of the time alleged was its own business decision and not an inevitable result of the operation of Order 4.

8. As to paragraphs 24, 30 and 34 of the complaint realleging paragraphs 2 through 23, 2 through 29 and 2 through 33 respectively of the complaint, Intervenor, in answer thereto, here realleges its answers contained herein to the specific paragraphs.

9. Intervenor denies each and every other allegation

contained in the complaint.

WHEREFORE, Intervenor demands judgment, dismissing the complaint, with costs.

SIMPSON THACHER & BARTLETT
Attorney for Pennmarva,
Dairymen's Cooperative
Federation, Inc.
Intervenor

One Battery Park Plaza
New York, N.Y. 10004

DONALD F. COPELAND
Member of the Philadelphia Bar
of Counsel

els

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DAIRYLEA COOPERATIVE, INC., Plaintiff,	:	
vs.	:	72 Civ. 4653
EARL L. BUTZ, Secretary of the Department of Agriculture of the United States, Defendant.	:	

Before:

HON. ROBERT L. CARTER,
District Judge.

New York, January 23, 1973;
10.30 o'clock a.m.
(Room 519)

APPEARANCES:

BOTEIN, HAYS, SKLAR & HERZBERG, Esqs.,
Attorneys for Plaintiff
SYDNEY C. WINTON, Esq.,
STANLEY M. KOLBER, Esq.,
Of Counsel.

WHITNEY NORTH SEYMOUR, JR., Esq.,
United States Attorney,
For the Government;
JOEL HARRIS, Esq.,
PAMELA DAVIS, Esq.,
Assistant United States Attorneys,
Of Counsel.

SIMPSON, THACHER & BARTLETT, Esqs.,
Attorneys for Defendant Intervenor
Pennmarva Cooperative, Inc.;
DONALD COPELAND, Esq.,
Of Counsel.

MR. HARRIS: Your Honor, the parties had made a stipulation that they had filed with the Court the administrative record in this case. We hadn't actually brought it to the Clerk's office on the sixth floor, but we have it in this box. As you can see, it's quite bulky. We would like to file it here, if we may.

THE COURT: All right.

As soon as the Clerk is through he will tell you where to put it.

MR. WINTON: If your Honor please, we would like to have access to it. We would like to get page references to it.

THE COURT: All right. If it is going to be filed in court, you will have full access to it.

(Pause.)

THE COURT: Mr. Harris, I would like for you before we start to give me some explanation as to the reason that the Government, or rather you, violated the

understanding we had in this case.

MR. HARRIS: I beg your pardon, your Honor?

THE COURT: You don't understand what I am talking about?

MR. HARRIS: I think if you are referring to the motion to dismiss --

THE COURT: It was my understanding that the Government was to file with the Court a motion going to the jurisdiction of this matter, on the 3rd, as I believe, of January, with answers to be filed by the plaintiff on the 8th of January; if the Government was going to raise the question of jurisdiction. Instead of that, you filed your jurisdictional papers as a part of the brief in this case. I consider that a violation of our understanding, and I want an explanation.

MR. HARRIS: Well, your Honor, I guesss we had a misunderstanding. If you recall the conference that took place which was when the Government wrote to the Court and requested an extension of time to file a motion for summary judgment, which request was denied, at that time the Government said it might as part of this motion make an argument going to the jurisdictional question. You are correct in saying --

THE COURT: The point that we had understood

was in terms of economy of time, and we agreed that therefore if the issue of jurisdiction was appropriate, there would be no necessity for the trial. And the whole purpose of our understanding was, it seemed to me, to have these issues out of the way before we actually came down to try this case.

MR. HARRIS: Your Honor at that time said if we were going to make such a motion, you set a briefing schedule. Simply put, your Honor, we weren't prepared as of that date with our motion papers, so we could not file them on that date.

I spoke to your clerk, I guess the next day, and indicated to him that we did not have the papers ready.

I would like at this time to introduce Miss Davis from our office, who is also an Assistant U. S. Attorney, who has been taking more of the work in this case, because I have had another trial commitment; in fact, I have been on trial before Judge Bonsal the entire last week. In effect it is still going on. She can direct herself as to why the papers weren't ready.

THE COURT: I am not interested in that. I am interested in if the papers weren't ready, why you are going to change the understanding, the plaintiffs have

a different understanding, but it seems to me what we are now faced with is because the Government was not able to get their papers in on time, we are now set for trial in this case, whereas, as a matter of fact it could well be that the case will turn and the decision will be made on the issue of jurisdiction.

It seems to me to be a waste of time for all the parties that are involved.

MR. HARRIS: I agree, your Honor. It is an unfortunate situation. That was one reason why I had asked for a longer extension of time. I had anticipated there would be problems. But there is a change of facts that occurred, your Honor.

That is what Miss Davis was going to address herself to, which we could not have addressed ourselves to upon papers on January 3, which we think bear directly on this. I think Miss Davis perhaps should have an opportunity to explain that.

The plaintiffs were not misled because I was in contact with Mr. Kolber and there was no misunderstanding.

THE COURT: I am not interested in what the plaintiffs were misled about. I was misled.

MISS DAVIS: May I speak on this?

THE COURT: Yes.

MR. WINTON: We don't agree with this statement that we weren't misled. I would like to have an opportunity later to address myself to that.

MISS DAVIS: As soon as the question of a motion to dismiss came up we were informed by the plaintiffs that the motion to dismiss of course is based on from the Government's point of view, the availability of an administrative remedy. The plaintiffs informed us in telephone conversations with Mr. Harris that they did not bring a petition for an administrative remedy because it was in their opinion that such remedy would not be available to them for a number of different reasons.

THE COURT: They said that in their briefs?

MISS DAVIS: Yes. And since the motion to dismiss was based on the availability of an administrative remedy, we felt, the Government felt that we could not bring a motion to dismiss until we were in a position to assure this Court that the administrative remedy was available. In other words, we didn't want to bring a motion saying that they must pursue an administrative remedy unless we were in a position to state that there was such an administratige remedy.

This is, of course, an unusual procedure,to go to the Department of Agriculture and ask them for their

stand on a situation that has not yet occurred. But we were able to do so. It was not until January 11 that we obtained that assurance.

The same day that we obtained it we so informed the plaintiff. It was waiting for this assurance and waiting to be in a position to tell the Court flat that there is an administrative remedy available, that postponed the bringing of the motion to dismiss. We are certainly sorry if you feel you have been misled, your Honor.

THE COURT: I have been misled and the explanation doesn't satisfy me. The Government understood when they came here and the Department of Agriculture knew when this case came here in November that the jurisdictional question was vital to their claim and they were going to raise it. In fact, I don't see anything in the papers that have been filed with me that indicate there was any special knowledge that took any length of time for anyone to learn. And I want to advise both you and Mr. Harris that when agreements are made and understandings are made with me as a member of the court in any proceedings, I expect all parties to keep them. All right.

Let's proceed.

MR. WINTON: I wanted to raise the other point,

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if your Honor please, that the brief filed by the Department has been unfair to the Court and to us. In the first place, we were never informed that there was a letter of January 11 or any other letter from the secretary agreeing to a 15-A proceed. Nor did we ever state that we would have preferred or wanted to have a 15-A proceeding. We wanted to have a lawsuit. We did say that the U. S. Attorney, we thought they shouldn't be thinking of anything but a judicial remedy because the Department's position was clear on the subject.

Later on, but only the last few days we gave them the authorities. But the Department is on record with its own standing position both in the judicial proceedings and in these 15-A proceedings, and its independent judicial officer, who is an independent administrative judge, has uniformly held that you can't bring a 15-A proceeding in this kind of case. His consent would be irrelevant. But we weren't informed that there was a formal consent. This is the first thing.

Secondly, the cases in our brief are peculiarly known to the Department. They peculiarly know that they don't want a cooperative to file a 15-A proceeding when the issue relates to payment out of the pool. And they did not disclose it to your Honor while dealing with

the rights of proprietary handlers.

I think they owed it to the Court and to us not to conceal these citations which ~~they~~ we have brought to your Honor's attention.

THE COURT: You will be given every opportunity and every right to make any, if you feel that you can, make any amendments or to file any additional papers with the Court on the question, because I do feel that this matter has not been handled in the way that I understood in November that we had agreed upon. All right. Let's proceed.

2 MR. WINTON: If your Honor should have any doubt on the jurisdictional question, we have been informed by farmers who are members of the ~~dairy league~~ Dairylea and who have this claim, to have them intervene. However, we would prefer not to have them intervene, so at some point we'd like your Honor's ruling on that question so that we could decide whether to have them intervene, or give us some idea of your thinking.

THE COURT: The problem about it is, that I now have to consider the question of jurisdiction as a part of the merits in the case. I am not going to consider it now. My advice to you is, that if you feel that you need the intervention of the farmers or any individuals

in regard to it in order to protect yourself, my advice for you is to do it out of an abundance of caution. I am deciding the merits of this case, rather the jurisdictional matter, along with the merits of this case.

I would think that if you want to have such an intervention, I am going to allow it as of now, and the Government will proceed with the case with the intervention if you so desire.

MR. WINTON: Could I have just a moment.

(Pause.)

MR. HARRIS: Your Honor, just a procedure matter.

I would like to introduce Mr. Donald F. Copeland of the Philadelphia bar, and move his admission to the Court for the purposes of this trial.

THE COURT: All right.

Mr. Copeland, you are welcome to participate in these proceedings.

MR. COPELAND: Thank you, your Honor. I appreciate the opportunity to appear before you.

THE COURT: I am going to admit Mr. Copeland for purposes of this case.

If you want to have an admission to the bar

generally, then you can file a petition at that time. You are admitted for the purposes of this case.

MR. WINTON: If your Honor please, it is a little confusing. Mr. Kolber, my partner, has filed an application for admission to the bar, too. He is a practicing member of the New York bar.

THE COURT: I am going to admit Mr. Kolber as well for this purpose, but there is a procedure for -- yes, I know I can do it.

MR. KOLBER: Your Honor, I am sorry. Just one word of explanation.

I had thought that I had done this with your consent by prearrangement, and apparently there has been some slip.

THE COURT: All right. I will admit you.

I understand that you have gotten the consent of a member of my staff, and therefore I will abide by that.

MR. KOLBER: Thank you, your Honor.

MR. WINTON: May I just have one moment to confer with other counsel?

THE COURT: All right.

(Pause.)

MR. WINTON: We have been unable to arrive at an

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agreement, if your Honor please. I would like to reserve this question until I have had a chance to give it some more consideration.

THE COURT: How long is this case going to take to try?

MR. WINTON: I think our case would take no more than a day at the most. I don't know how much the cross-examination would take. When I was asked, I said it may take another half day for the cross-examination. I have been told that the Government didn't plan to call any witnesses,, and Mr. Copeland said he might or might not call a witness.

THE COURT: All right. Let me ascertain that now.

Mr. Harris, how long after the plaintiff's case do you think you will need?

MR. HARRIS: We have an affidavit by somebody and if it comes in by stipulation we won't have to call him at all. Otherwise it might be a five-minute witness and that is it.

THE COURT: Mr. Copeland?

MR. COPELAND: If your Honor please, depending on what evidence the plaintiff puts in, I understand they will put an expert witness on the stand to testify.

Depending on what he testifies to, if I anticipate correctly what he will testify to, I will have one witness to testify. I would anticipate that his direct might take an hour to two hours.

THE COURT: All right.

I think that we may be prepared, we may go to 6 o'clock tonight.

You may proceed, Mr. Winton.

MR. WINTON: Would you like an opening statement, if your Honor please?

THE COURT: I don't think so, but it is up to you. I think that all the papers have been filed in this case, and I have a clear idea of what is involved. I do not think your telling me any more would clarify. But that is up to you.

MR. WINTON: I will just make one short statement. I had prepared some extended remarks, but I certainly don't think they will help in view of what is in our brief, which covers most of it.

The gist of our case is not whether there can be a so-called base excess plan but whether this particular base excess plan, with its 12-month payout provision and its arbitrary bases to a new producer is discriminatory. We feel it's like if someone had a base excess

plan you could only have a redheaded farmer, for instance, could have a base. We feel it is discriminatory. That's all I wish to say preliminarily. I will call a witness.

MISS DAVIS: May I speak to this?

THE COURT: Yes.

MISS DAVIS: The Government would like to address itself in the opening statement solely to the question of the scope of the hearing. It's the Government's contention, your Honor, that the plaintiff has three traditional grievances in the administrative review context.

The first is that particular sections of an administrative regulation were not authorized by the Act. That is clearly a legal question covered in papers.

The second contention is that the same aspects, the same parts of the Order were not submitted by the substantial evidence of the administrative record below. We have just filed the administrative record with the Court, and obviously the resolution of that question depends solely on the balance of the administrative record.

The final contention is that if the above contentions are not true, that is, if there was sub-

stantial evidence, it was authorzed by the Act, andthe Act is unconstitutional as it appliest to the plaintiff. Again, this is a legal argument where we needn't go beyond the bounds of the administrative record.

It is therefore the Government's primary contention that this is a case of administrative review, where it is bound by the scope of the record in the hearings below, and that a trial de novo, or indeed the introduction of any new evidence would be inappropriate. We have a brief on the point that I would like to hand up at this time.

(Handing to Court.)

MR. WINTON: We anticipated this, though we weren't given a copy of the brief, and the Government knew we were going to try to introduce evidence. I have a memorandum I would like to hand up.

THE COURT: All right.

I would like to briefly hear your views on this point. But let me get the Government's side, because I am sure Mr. Copeland is supporting the Government's position. So I will hear that first.

MR. COPELAND: Yes, your Honor. Very, very briefly, we are in accord with the Government's position. We feel that under the facts in this case that there should

not be any evidentiary hearing.

MR. WINTON: There are several aspects of this case.

In the first point, we are attacking the Order as it is on its face, saying the decision doesn't support it and the record doesn't support the decision. That is one aspect and that is what they are addressing themselves to. But there is another aspect.

We say as applied to us on the facts as we have had them applied to us, it's in violation of both the law and the Constitution. The facts pertaining to us and as it is ~~applied~~ applied to us, we are entitled to put evidence in showing just what the situation is and what is illegal as applied to us.

The final question is, there is a lot of testimony of an expert nature. I have given your Honor a brief which shows that the Courts traditionally receive this. In fact, they take judicial notice of it. We have a witness of that type who will deal with matters which are almost equivalent to judicial notice.

THE COURT: In any event, my position on it is that whatever the merits of the Government's position, it comes too late. It was known, I think in November, that the plaintiff intended to put on an evidentiary

hearing and it was known certainly in December that this was so. And the scope of the hearing in regard to the number of days, and so forth, I think was very clear. Therefore, whatever the merits of it as far as I am concerned, it comes late. We will proceed with the hearing.

All right, Mr. Winton.

MR. WINTON: Mr. O'Brien, please.

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GEORGE W. O'BRIEN, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WHITTON:

Q What is your occupation?

MR. HARRIS: Your Honor, may the record just note my objection to Mr. O'Brien testifying.

THE COURT: Yes.

MR. COPELAND: A point of clarification.

Would my understanding be correct that when we raise an objection, and your Honor overrules it, we have an automatic exception?

3 THE COURT: You have an automatic exception. I will assume that you are now objecting to all the testimony that is coming in, not only of this witness, but any witness who will be introduced, as it goes outside the administrative record.

Your objection will be noted in the record and you don't have to clutter the record up any further. You are protected.

MR. COPELAND: Thank you.

Q What is your occupation, Mr. O'Brien?

A I am employed as an economist for Dairylea

Cooperative, Inc.

Q In that connection what are your duties?

A My duties are to work with the market regulations under which we market milk; to forecast productions and prices in the marketing of milk, and to analyze milk marketing situations and problems, and attempt to formulate proposals to remedy particular problems that may arise from time to time.

Q It is part of your duty to study and familiarize yourself with the provisions of marketing Orders issues under the agricultural marketing agreement Act?

A Yes, it is.

Q Would you tell the Cour the Orders with which you had occasion to work and study and testify, I believe?

A The Boston Regional Order, which is Order No. 1; the Connecticut Market Order, which is Order No. 15; the New York-New Jersey Market Order, which is Order No. 2; the Middle Atlantic Order, which is Order No. 4; and the Eastern Ohio-Western Pennsylvania Order, which is Order No. 36.

Then there are State regulations in the Buffalo and Rochester areas which are markets operated by the State of New York; and the severalareas within the State of Pennsylvania where we market milk, under the Pennsyl-

sylvania Milk Marketing Board.

Q The first mentioned group of Orders were Federal Orders; were they not?

A They were, yes.

Q And Order 4 is the order involved in this case?

A Yes.

Q Are you also a member of any industry committees dealing with the marketing of milk?

A Yes. I am in the Market Order Committee of the National Milk Producers Federation. I also am on the board of directors of the National Milk Producers Federation, and the advisory board to the United Dairy Industries Association.

Q Will you tell the Court something of your educational background as it pertains to your knowledge as an expert?

A I have a Bachelor of Science degree in agricultural economics from Cornell University and a Master of Science degree also in agricultural economics from Rutgers University.

Q In the course of how many years have you been involved in the marketing of milk and the study of Federal Orders and the dairy situation generally?

A Almost from the start of my employment with

Dairylea, which was on July 1, 1949.

Q What are your current duties with respect to familiarity with the marketing records of Dairylea, the plaintiff here?

A (No response.)

Q Are you familiar with the records which it keeps of marketing of milk and deliveries by producers, and so forth?

A Yes, in a fairly general way.

Q Are those records kept in the ordinary course of business?

A Yes.

Q Have you made, at my request, and I will offer them later, various compilations and schedules which reflect the records of the Dairylea Association?

A Yes, I have.

Q Those compilations, and so forth, are accurately prepared?

A To the best of my knowledge.

Q And ability?

A Yes.

MR. WINTON: If your Honor please, before I proceed further I would like to ask how your Honor would handle the question of the stipulation of facts which has

been entered into between the various parties. Shall we read it in, or shall we file it? There is no difference of opinion. The stipulation provides that the parties can object to various facts which are stipulated on the ground of relevancy or whatever other ground.

THE COURT: Probably if there are going to be objections, I suppose what you ought to do is, it should be set out in the transcript. I really don't want to take the time.

MR. HARRIS: Your Honor, perhaps we could just file a stipulation of accord and the parties in a post-trial brief could -- the objections all go to relevance, I may say.

THE COURT: That is good enough. Why don't we do that. File the stipulation and make them a part of the record. Then the objections are indicated, as a matter of fact, at the top of the stipulation. You can then file briefs on it.

MR. COPELAND: If your Honor please, I would also assume in the light of your earlier ruling, I would just like to point out, of course, we would also object on the same basis that objecting to any evidence coming into the record. I just wanted to make that clear for the record.

The fact that we have a stipulation here in so far as your Honor has ruled that you are going to permit testimony, that the stipulation, these are the facts, which would prevent extension of the trial. But we still renew our objection to any evidence being introduced whatever.

THE COURT: I think I indicated before, Mr. Copeland, that I understand that; that I made clear on the record that you and Mr. Harris have a standing objection to any evidence that it introduced in this case, and I do not think it is necessary for you to make that objection.

MR. COPELAND: Thank you, your Honor.

MR. WINTON: I would ask, if your Honor please, if you deem it appropriate, that we receive the stipulation in evidence as an exhibit, then.

THE COURT: All right. It will be Plaintiff's Exhibit 1.

Why don't you file it.

MR. WINTON: I think your Honor has the original.

THE COURT: I do.

(Plaintiff's Exhibit 1 was received in evidence.)

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THE COURT: There are some attachments.

Are they part of the stipulation as well, Mr.

Harris?

MR. WINTON: Yes, the attachments to the stipulation are all part of it, but there are to be two supplemental attachments. One to Paragraph 17 and one to Paragraph 19.

THE COURT: Two supplemental attachments?

MR. WINTON: Yes. But we have not been able to reach agreement on the two supplemental parts.

MR. HARRIS: They were produced late yesterday, your Honor, and this morning, and we have not been able to agree.

MR. WINTON: The attachments are in here, your Honor.

THE COURT: I just wanted to be sure that they are part of it.

MR. WINTON: If your Honor will refer to Paragraph 17 of the stipulation, Exhibit 1, you will see about three or four inches from the bottom of page 5, a statement that:

"Attached hereto as Schedule 2 is a schedule showing the uniform base and excess prices and the weighted average blend price under Order 4," and various other things.

In point of fact, that was not attached at the

time, and we prepared it but we were unable to get it cleared by other counsel. So at this time I would like to offer as an exhibit what was to be Schedule 2. which we have marked Schedule 2, Part 1, for the reason that by an error there is another Schedule 2 referred to in the stipulation.

MR. HARRIS: Is that just the top page?

MR. WINTON: Yes.

MR. HARRIS: Your Honor, other than our continuing objection, we have no objection to that page.

THE COURT: All right. It will be received.

(Plaintiff's Exhibit 2 was received in evidence.)

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MR. WINTON: If your honor please, Plaintiff's Exhibit 2 is background material showing the comparative prices ~~bases~~ under the two orders, the Order 2 order being the one covering the New York-New Jersey marketing area, and Order 4 being the one in question in this lawsuit. It show the base price for each month in January, 1971 through December, 1972 under Order 4 the excess price and the weighted average or blend. I should explain that.

The weighted average or blend is announced by the Market Administrator under Order 4, and that is what the price would have been if instead of a base and excess

price they would have had just a simple uniform price. It is announced each month. And then the price under Order 2 is the uniform price which would be comparable with the weighted average or blend price.

In Paragraph 19 of the stipulation, Exhibit 1, there is reference to another Schedule 2 which was to be added by supplemental stipulation, showing plaintiff's members who shifted into Order 4 in May, June and October 1972; and showing for each such producer his deliveries during the period of August through December, 1971. That period is the period which historically other producers who were previously under the Order got recognition as base, but which it was denied to our producers.

This schedule was to show what his base would have been if it was based on those deliveries, and also showing his deliveries during each of the months of this year; that is, May through November of 1972, the amounts received in respect of those deliveries under the Order as it was interpreted by the Government, and the amounts which would have been received, which is greater, if we are right and it was illegal to deny us a base based on historical production.

Your Honor will recall that there are still the months of December, January and February which we can't

give figures yet because those figures were not available.

Q I show you, Mr. O'Brien, certain schedules and ask you whether these were prepared by you from the records of Dairylea and accurately set forth the matters therein?

MR. HARRIS: Could we have those marked for identification, so we could be clear when he says "schedules".

THE COURT: I gather when he identifies them you are going to mark them.

MR. WINTON: That's right.

A These were prepared at my direction.

Q Do they accurately set forth the various matters which they purport to reflect?

A I believe they do, yes.

MR. WINTON: I ask that this group of papers be marked for identification.

It is marked Schedule 2, Part II-A, and Schedule 2, Part II-B; Schedule 2, Part II-C.

Incidentally, the second numbers are Roman.

Part II-C has three parts, marked C-1, 2 and 3.

There is a Schedule 2, Part II-D, which has three parts, as one exhibit.

(Plaintiff's Exhibit 3 was marked for

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identification.

Q I hand this exhibit for identification to you. I want to ask you a few questions about it.

Referring to Schedule 2, Part II-A, it's marked re Paragraph 19.

Will you explain to the Court who the people are that are marked producer on that schedule?

MR. HARRIS: Your Honor, I am going to object to the witness proceeding out of a document that is not in evidence, unless he is trying to explain how it was prepared, or to lay a foundation to put it into evidence. But I object to putting into evidence through the witness' mouth reading from a document that has only been marked for identification.

THE COURT: I think that objection is well taken.

MR. WINTON: Your Honor, I just asked him to explain what the column meant, not what the paper purports to show.

THE COURT: Are you going to introduce it into evidence?

MR. WINTON: Yes. I am going to make sure that the columns which may not be self-explanatory, are explained.

THE COURT: If you are going to introduce it into evidence, you can ask him to explain it after it has been introduced.

MR. WINTON: I offer this into evidence, then.

MR. HARRIS: May we some voir dire on that, your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. HARRIS:

Q I would like to show you page 1, the top page of this schedule, which has been marked as Plaintiff's Exhibit 3 for identification and ask if that is complete?

A I'm not sure I understand.

Q You have a series of columns with figures in them. What I want to know is, if you have completed the information for all of the persons represented on the exhibit?

A Not all of the persons that are listed in the first column.

Q Are there any other places, to your knowledge, in Plaintiff's Exhibit 3 where there is information that is not set forth?

A No.

Q This is the only place?

A Yes.

Q The second question I have, sir, is, have you read Paragraph 19 of the stipulation of facts?

A Yes.

Q Will you read the first sentence of the stipulation of Paragraph 19?

A It says:

"There will be annexed hereto a schedule to be added by supplemental stipulation showing plaintiff's members who shifted into Order 4 in May, June, and October, 1972, and showing for each such producer his deliveries during the period of August to December, 1971."

Q You can stop there.

Where in this Plaintiff's Exhibit 3 is there anything showing the deliveries of the producers during the period August to December, 1971.

MR. WINTON: I object, if your Honor please. That relates to the supplemental data which I have here showing what the bases calculation was. I hadn't completed all the offers to complete the stipulation.

MR. HARRIS: I think, your Honor, this was being offered as a response to Paragraph 19 of the stipulation, and it is not responsive. It's only partially

responsive.

MR. WINTON: I didn't say it covered everything.

THE COURT: I do not believe he said that, Mr. Harris. The only thing that I recall is referring to the stipulation was it was Exhibit No. 2 and he referred me to a paragraph in the stipulation, which I think was Paragraph 17.

MR. HARRIS: Yes, your Honor.

THE COURT: I do not think he's made any -- not yet -- any reference to that part of the stipulation. At least I haven't heard.

MR. HARRIS: I misunderstood. I thought he had. That was the purpose of the voir dire.

MR. WINTON: Perhaps I should also have marked for identification the other group of schedules which would refer to the matter which Mr. Harris has just raised.

THE COURT: You can do anything you want.

MR. HARRIS: The problem is taken in combination they are supposed to refer to Paragraph 19. He split them up and gave us half yesterday and the other half this morning. That is the confusion, your Honor.

THE COURT: Let us get Exhibit 3.

Having completed the voir dire, is there any

objection to it?

MR. HARRIS: None other than our continuing objection.

THE COURT: We will admit Exhibit 3.

(Plaintiff's Exhibit 3 was received in evidence.)

xx BY MR. WINTON:

Q Will you look at the first page of Exhibit 3, which is marked Schedule 2, Part II-A.

You were asked some questions about the blanks appearing as to the first few producers under the columns at the extreme right, base pounds and excess pounds.

A Explain why they are blank?

Q Yes.

A These producers, we didn't have the data for them at the time we made this schedule. Subsequent to preparing this schedule we did get that data and we have it available.

Q But the figures which are incorporated here as to the amount of the plaintiff's damages, in these schedules which are Exhibit 3 do not reflect any damages claimed for those particular producers as to which it is blank; is that correct?

A That's correct.

Q So that in addition to the damage figures covered by this schedule there would be an additional damage which the plaintiff is claiming?

A Yes.

Q Will you explain who are covered by Schedule 2, Part II-A, which is also marked re Paragraph 19, and it states that it refers to producers who shifted in May, 1972, covering May-September, 1972?

A This would be a group of producers which we shifted from Order 2 distributing plants to an Order 4 distributing plant, beginning in May, 1972.

Q When you say "we", you mean the plaintiff Dairylea?

A Yes.

Q And these producers are producer members of the Dairylea Cooperative Association?

A Yes.

Q As a matter of fact, all the producers in this schedule are such members, are they not?

A Yes, they are.

Q The identification number, would you explain what that means?

A That is the individual producer's contract number with the Association.

Q That is the number with which you identified them on the record of the Association?

A Yes.

Q The figure daily base, what is that?

A That would be a calculation based upon his production during the August through December, 1971 period of time.

Q That is, if he were given a historical bases based on his actual marketing during that period?

A Yes.

Q You also have, do you not, but has not yet been offered, the underlying data on which that was computed?

A Yes.

Q The other figure, called May Production, what does that mean?

A That is his actual pounds of milk which was delivered in the month of May.

Q 1972?

A Yes.

Q And the column, number of days, what does that refer to?

A Number of days in the month of May.

Q 1972?

A Yes.

Q Then you have a column headed base pounds, and another column headed excess pounds.

Would you explain what that is?

A The base pounds is calculated by multiplying the daily base by the number of days in the month to give the total base pounds for that producer in the month of May.

THE COURT: Do you have a copy of this for me?

MR. WINTON: I am sorry. I hadn't realized, your Honor, I had taken it back. They are stapled in parts which fall into convenient sections, which we are going to inquire about.

Q At the bottom of the first page is a tabulation which has three columns, without bases, with bases, and loss.

Would you explain what that is?

A Yes. The figures on the left which rei er to without bases shows the volume of base milk and the volume of excess milk in the month of May under the assignment provision of the Order which would have given these producers a 50 per cent base, and therefore, the figure of base milk and excess milk is the same.

This is multiplied by a base price and the

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excess price, each amount, and totaled together into a total dollar figure which would have been received if these producers had the 50 per cent bases.

If they had had historical bases that shows in the second column which is entitled with bases, something that the producers would have had a substantially higher volume of base milk and a substantially lower volume of excess milk. And using the same prices for base milk and excess milk, the total dollars would have been increased by virtue of a full base as compared to only a 50 per cent base.

The difference in the total dollars is shown in the right-hand column, of over $1200.

Q That is the loss for the producers as to whom the data is filled in under the column number of days, base pounds and excess pounds?

A Yes.

Q It does not include the loss as to those producers for whom those three columns are left blank?

A No, it does not.

Q One other thing:

The column without base means without historical base; is that correct?

A That's correct.

Q But it does reflect the assigned percentage of production base which we attack here as arbitrary?

A Yes.

Q The other pages of Schedule 2, Part II-A are prepared on the same bases but cover the months of June, July, August, and September, 1972: is that correct?

A Yes.

Q I would address your attention now to Schedule 2, Part II-B, which is also marked re Paragraph 19, and would ask you to explain what that schedule relates to?

A This is similar to the previous schedule, except that this covers a group of producers which the Association shifted to Order 4 market on June 1, 1972.

Q And it covers the loss they suffered for the period of June through September, 1972?

A Yes, it does.

Q And this is another group of producers from the one in the prior schedule?

A Yes.

Q And the headings, and so forth, are prepared on the same basis as the prior schedule?

A Yes.

Q I address your attention now to the schedule which is marked Schedule 2, Part II C-1, Salem-006

summary calculations for October, 1972, and underlying data.

Will you explain that?

First, what is Salem 006?

A That is just an accounting designation that the Association puts for this group of producers. The covering schedules shows the amount of money that would have been received from the Order 4 market for this group of producers under the assignment of their actual receipts to 70 per cent base and 30 per cent excess as is provided by the market Order.

Q May I stop you.

You said the covering schedule, you mean the first page of this?

A First page.

Q Yes.

Would you continue?

A The second part, which refers to with bases shows that if these producers' production during the previous August through December period had been recognized in its entirety in the calculation of bases that instead of a 70 per cent base they would have had 92.6 per cent base milk and, therefore, the return from a full base would have been $6,848.46 more for this group

than it actually was as provided by the market Order.

Q The headings without bases have the same meaning as in all these schedules, that is, they have the arbitrary assigned base only in that heading?

A Yes.

Q Would you explain just so the Court may follow what the attached sheets show? They are computer runs, aren't they?

A Yes.

Q Would you just explain them, so you can follow these rather cryptic headings.

It says, for instance, Herbert Knight. That is a producer's name?

A That is a producer's name and address.

Q Freight rate, what is that?

A Freight rate is a zone ustment under the New York-New Jersey Market Order.

Q That is not material for this purpose, is it?

A No, it's not.

Q Patron -- there is a number there. What is that?

A Patron number is just an assigned number designating him on a particular pickup route or location.

Q And that isn't particularly pertinent to this

case?

A No, it's not.

Q The reason these are on is because they are on the computer run from which it is prepared; is that correct?

A That's correct.

Q The heading contract form, that is the identification number of the particular producer, isn't it?

A Yes, it is.

Q Now you come to a relevant heading.

Pounds, and then there is a number under it. What does that indicate?

A That is the actual pounds of milk that this producer delivered in the month of October.

Q 1972?

A Yes.

Q And then you have the butter fat test, BF means butter fat, doesn't it?

A Yes, the test.

Q Butter fat pounds, those two columns aren't particularly relevant to this case either, are they?

A No.

Q Then you have daily base.

What is that?

A The daily base is the figure that we have calculated as his average daily production during the previous August through December, 1971.

Q That is what we would call a historical basis here, is that right?

A Yes.

Q Then they have something called prod. days. What is that?

A That is production days.

Q During which month? The month of October, '72, in this case?

A Yes.

Q Then what is the column base pounds?

A The base pounds is the daily base multiplied by the number of days in the month.

Q And then you have a column headed excess pounds. What is that?

A The excess pounds, when the base pounds is lower than the actual production pounds for the month, that means that there is excess pounds, and this would fall in that column.

Q The data on these computer runs is summarized in the face sheet which you described before, which is headed Salem 006?

A Yes.

THE COURT: I think we better take a break. I think the reporter has been at it since 10 o'clock. We will take a 10-minute recess.

(Recess.)

BY MR. WINTON:

Q We were asking some questions about the Schedule 2, Part II C-1, I believe.

The next schedule is a similar one but it relates to a famous designation, 007.

A Yes.

Q It is another group of producers who are on the Salem bulk tank route?

A Yes.

Q That is Schedule 2, Part II C-1, and Part II C-2, relate to the Salem bulk tank producers; is that correct?

A Yes.

Q It is just split because of the accounting method by which the records are kept?

A Yes.

Q Does the first sheet also summarize, in the case of Part II C-2, the calculations the way the other facing sheet on the prior part did?

A Yes.

Q It shows that on Schedule 2, Part II C-2 what was a loss in the month of October of $10,294.68?

A Yes.

Q That is in addition to the loss for the 46 producers shown on Part II C-1 of $6,848?

A Yes.

THE COURT: This schedules refers to 63 producers?

MR. WINTON: Yes, your Honor. One refers to 46, and this is an additional 83.

Salem 006 is a unit with 46 producers and Salem 007 is an additional accounting unit with 83 producers.

THE COURT: This constitutes a total number of producers that are involved in this litigation?

MR. WINTON: The prior schedule, which covered some others who came in, and these schedules, which show everybody in October for Salem, and the schedules still to come will show everybody at the Honesdale plant for October. But these schedules cover all the Salem producers for the months of October on, but there were some covered for a prior period, who switched earlier.

Q Referring to the schedule which is marked

Schedule 2, Part II C-3 headed Honesdale summary calculations for October, 1972, the headings and the producer runs have the same explanations that you have given for the other schedules, don't they?

A Yes.

Q That shows that the plaintiff's members who were delivering to the Honesdale plant and who entered Order 4 for the month of October, 1972 had a loss of $35,445.89, that being the figure, if your Honor please, in the lower righthand corner.

THE COURT: Yes, I am following.

Q Is that correct?

A Yes.

Q The next schedule, which is labeled Schedule 2, Part II D-1, your testimony would be similar to the headings and method of preparation?

A Yes.

Q And that shows that the same -- what is this, Salem -- this is Salem.

Would you explain that? This is Salem for the month of November on Route 006?

A Yes.

Q That shows a loss for that group of producers for November, 1972, of $6,220.09?

A Yes.

Q The next schedule is Schedule 2, Part II D-2 and that shows the same thing for the Salem Route 007 for the Month of November, 1972, with a loss for that month of $9,820.18 for those producers?

A Yes.

Q And the final schedule in this group is entitled Schedule 2, Part II-3 Honesdale summary calculations for November, 1972. And that shows in the same way the loss to those producers for the month of November which is $33,489.11; is that correct?

A Yes.

Q Have you made some calculations to estimate the loss which all of the producers who are involved in this action that are plaintiff's producer members are likely to have for months of December, 1972, January, February, 1973?

A Very rough calculations on that.

MR. WINTON: If your Honor please, on this part we would merely like a declaration of the rights of the plaintiff, but we'd like to indicate to your Honor the rough amount involved in the parts still to be determined as to deliveries which have yet been made and the December deliveries.

Q Would you explain to the Court what your estimate is and the basis of it?

A Yes.

The assigned bases for October and November are 70 base milk and 30 per cent excess milk.

In the months of December, January and February, the assigned bases will be 60 per cent base milk and 40 per cent excess milk. Therefore, the dollar amounts should be at least equal to the October and November amounts, and probably a small amount larger; so that they should be in excess of $50,000 in each month.

THE COURT: The problem -- well, I don't suppose it matters anyway.

What are you talking about now? You have introduced schedules about loss for the various months that apply to some of the producers. One of these schedules involved in Salem No. 2, the point is, are you making that figure in respect to November for each of these items that you think would be about the same? Is that what you are telling me?

THE WITNESS: No. We have made the calculations for --

THE COURT: For all of them?

THE WITNESS: For all the producers through the

month of November. The data is just becoming available now to make the calculation for December.

THE COURT: I understand that. But I understood you to say that the loss would be about the same as it was for November, for December and January.

You figure it would be about the same or somewhat larger. I thought you gave a figure of $50,000. Maybe I wasn't listening too attentively. What I want to know is, are you talking about all the producers or am I to look at the November schedule for Salem that you have here, Part C-1 and C-2 and get an idea based on that and add the figures together? That is what I want to find out.

MR. WINTON: Perhaps I could clarify it, if your Honor please.

THE COURT: You have somebody to testify, and I want him to testify.

MR. WINTON: Fine. Perhaps I could introduce another schedule which will I think answer all the questions your Honor raised.

THE COURT: All right.

Q I show you a schedule and ask you whether you prepared this schedule?

A Yes, I did.

Q That was prepared on the basis of Dairylea's records and the pertinent data?

A Yes, it was.

Q Will you explain what this schedule shows?

A This shows the calculated loss by months for May, 1972 through November, 1972.

Q That is for all the producers involved, whether Salem or Honesdale, and whether they switched in May, 1972, June, 1972, or, as the bulk of them did, in October 1972; is that correct?

A Yes.

Q And this summarizes the losses and it shows that for the Salem producers who switched in May, 1972 their loss for that month was as indicated, $1235, skipping the pennies; June, $3601; July, $2624; August, $941; September, $2059.

That's all Salem producers; isn't it?

A Yes.

MR. HARRIS: He is reading that again.

THE COURT: Yes, Mr. Harris.

MR. HARRIS: I object to his reading a document that is not in evidence.

THE COURT: I realize you were going to make an objection. That is why I smiled.

MR. WINTON: May I offer it, if your Honor please?

THE COURT: Are you offering it?

MR. WINTON: I offer it in evidence.

MR. HARRIS: May I just have a little voir dire, your Honor?

THE COURT: Is this Plaintiff's Exhibit 4?

MR. HARRIS: Yes.

VOIR DIRE EXAMINATION

BY MR. HARRIS:

Q Mr. O'Brien, do the figures opposite October and November, for instance, would they correspond to the total losses that you just indicated on Plaintiff's Exhibit 3, on those top summary sheets?

A Yes.

Q With respect to your footnote where you say additional losses for December and January and February are estimated to exceed $50,000, is that based on certain assumptions that you have made?

A I assume that these same producers will stay associated with the Association, as they are at the present time.

Q Are you also assuming that they produce about the same amount of milk that they produced in order to

reach the calculations that you have done for the past?

A I think that $50,000 is probably conservative because this is the period of the year when production is normally increasing, so that there will be more pounds of milk involved. Plus the fact that the assigned base under the Market Order decreases from 70 per cent to 60 per cent, which would make the loss greater than in the months of October and November.

Q I understand that. But you must be making some assumptions to arrive at the figure of $50,000, that there would be deliveries of milk to Order 4 from the Salem and Honesdale people; isn't that correct?

A Yes.

MR. HARRIS: All right. Then we have no objection.

THE COURT: You are making the assumption that if the deliveries are the same in November, the same in December and January and February as in November, that these figures are correct; is that correct?

THE WITNESS: Yes.

THE COURT: That would be roughly $50,000 loss?

THE WITNESS: Probably larger.

MR. HARRIS: No objection.

THE COURT: All right. It will be received.

(Plaintiff's Exhibit 4 was received in evidence.)

MR. WINTON: Your Honor, I have been asked to make it clear that the figure is 50,000 a month and that the aggregate we are claiming here is in the neighborhood of $260,000.

THE COURT: I understand that perfectly.

MR. WINTON: I thought so.

THE COURT: You have made that abundantly clear. All right.

MR. WINTON: At this time I would like to offer two reports. They are copies of reports filed with the Market Administrator under Order 4. I ask that these be marked for identification.

At this time I'll ask that the one marked for identification be the one which is entitled United States Department of Agriculture, and it bears the date in the upper right-hand corner, November 10, 1972, and it relates to the delivery month of October, '72, and it was filed by Dairylea Cooperative, Inc., as handler.

(Plaintiff's Exhibit 5 was marked for identification.)

BY MR. WINTON:

Q Will you explain to the Court what Exhibit 5 is, the paper which has just been marked for identification?

A This is the report filed by Dairylea Cooperative, Inc. with the Order 4 Market Administrator following the month of October. This shows the receipts of milk from the producers and how the milk was disposed of from the Honesdale plant. The disposition of the milk is shown on the second page, with most of the receipts going to the Johanna Farms plant in Flemington, New Jersey.

Q That is the kind of report required by the Market Administrator from handlers; whether they are proprietary or cooperative?

A Yes.

Q This relates to the Honesdale, Pennsylvania, plant involved in this lawsuit?

A Yes, it does.

Q You did not file a report as handler, did you, Dairylea, that is, for the milk that was described as the Salem bulk plant?

MR. HARRIS: Objection to the leading of the witness, your Honor.

MR. WINTON: That is only formal material that

is of record.

THE COURT: The objection is to leading question, and I suppose it is in order at any time.

MR. WINTON: I offer Exhibit 5 in evidence at this time.

MR. HARRIS: No objection.

(Plaintiff's Exhibit 5 was received in evidence.)

xx Q Is Exhibit 5 typical of the kind of reports that handlers, proprietary or cooperative, are required to file with the Market Administrator of Order 4?

A Yes.

Q And it is filed every month?

A It is required every month, yes.

Q What is the next step in the auditing procedure? What happens next?

In that connection I show you a paper which is entitled pool obligation, producers settlement fund.

A The Administrator receives the report --

THE COURT: We are about to have another objection, so, Mr. Winton, when you do that, just mark it for identification.

MR. WINTON: I ask that this be marked for identification.

(Plaintiff's Exhibit 6 was marked for identification.)

Q I ask you, what is Exhibit 6 marked for identification?

A Exhibit 6 is the computation of the net pool obligation of the reporting handler based upon the original report submitted to the Market Administrator, whereby he calculates as to how the milk was actually used at the various class prices, and at the same time calculates what is due to the producers, and determines from that as to whether a payment is required into the Market Administrator's pool or out of the Market Administrator's pool. And that is based upon if the net pool obligation, depending upon the classification and pricing of the milk at that plant comes out at a weighted average price lower than the market average; then the plant would have an obligation or a payment back from the Market Administrator.

But if the utilization of the milk at that plant were higher than the market average, then the plant would have a payment due to the administrative pool. And that is what this calculation is about.

Q Exhibits 5 and 6 are the method by which the pool equalization is accomplished?

A Yes, it is.

Q And Exhibit 6 is something compiled and billed by the Market Administrator, and Exhibit 5 is something filed by the handler; is that right?

A Yes.

MR. WINTON: I offer these in evidence.

MR. HARRIS: No objection.

(Plaintiff's Exhibit 6 was received in evidence.)

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THE COURT: I am not sure how important this is, but so that I can follow this, where is the -- I think you said average price in the market? Where does one find that to make a determination as to whether there is anything due to the producer?

THE WITNESS: It is in the column on the right, your Honor, on line No. 28, would be a determination by the Administrator as to whether there is a payment due to the producers settlement fund or from it.

THE COURT: What is line 15?

THE WITNESS: This would be a credit section at which the producers who delivered to the Honesdale plant, the assigned base milk would show in the first column, that is the product pounds figure, 6,792,000 pounds. That would represent in October, 70 per cent of the produc-

tion multiplied by the base price, which would be the $7.13 to give a credit value of the $484,000.

Line 15 would be the pounds of excess milk priced at the excess price. And together the $484,000 and the $151,000 less a location adjustment because the Honesdale plant is in a minus 21-cent zone mileagewise from Philadelphia, the total of those lines of $1,621,000 is smaller than the figure up above on line 4, which is the net pool obligation.

The net pool obligation is the class prices; that is the pounds of milk; how they were used, multiplied by the class prices. And to the extent that the amount of moneys available to these producers is less than the net pool obligation, the handler is required to pay into the administrative pool.

THE COURT: I see. That is how you get line 26.

THE WITNESS: Yes.

The further adjustments down at the bottom are calculations of the administrative assessment at 2-1/2 cents per hundredweight on milk which was not delivered to an Order 4 plant.

THE COURT: Thank you.

Q There is one other thing in connection with

that.

What is the situation as to charging an administrative assessment to a cooperative handler on bulk milk or bulk tank milk, under Order 4?

A If the cooperative is responsible for piking it up and delivering the milk to the proprietary handler, to the extent that there is any loss on that milk and assigned to the cooperative, the administrative assessment would apply to the cooperative in that case.

Q When you say loss, you mean shrinkage of milk?

A Shrinkage of milk, yes.

Q That is only a minor part of the total amount involved in a shipment?

A Yes.

Q How much is it, relatively?

A As far as the cooperative is concerned, it is limited on a pickup to a half of 1 per cent.

MR. WINTON: At this time, if your Honor please, I would like to call your Honor's attention to the decision in this matter made by the secretary on the basis of which Order 4 was promulgated in which he explains that co-ops in general except for that minor part relating to the shrinkage of milk are excepted from the administrative assessment, and that that must be made by the proprietary

handler who buys the milk from the co-op.

I would like to read to your Honor from page 7940 of the Federal Register of May 22, 1970, which contains the decision.

MR. HARRIS: Would your Honor like a copy of that? In fact, your Honor, we were going to supply your Honor with a booklet copy of the booklet Orders 2 and 4 and the statute.

MR. WINTON: I was going to do it later on.

THE COURT: Well, thank you.

MR. WINTON: We will mark them, if your Honor would permit us, later.

MR. HARRIS: Sure.

MR. WINTON: In Column 2, if your Honor please, right near the beginning, the fourth line, it says:

"The Act," referring to the market agreement, "provides that the administrative cost of the Order shall be borne by the handlers. In this connection, it seems apparent that Congress must have contemplated, in any circumstance in which a proprietary handler was purchasing milk from a cooperative association, that the assessment would be passed on to the proprietary handler. If this were not the case, all proprietary handlers could simply

avoid the burden of administrative cost by purchasing milk only from cooperation associations."

I call that to your Honor's attention to show that the cooperative association is treated as a farmer in this connection when they are dealing with these matters and not always the same as a proprietary handler.

One of the questions raised in this case and here the administrative assessment reflects that treatment.

MR. HARRIS: Your Honor, we object to Mr. Winton making this sort of legal argument during the putting in of testimony. I don't object to his reading published material, but his legal arguments should be reserved to opening or closing statements or briefs.

MR. WINTON: I think your Honor is entitled to know the relevancy of some of the things that we are putting in in a rather complex matter.

THE COURT: Sometimes, instead of clarifying, it confuses; so I think you better bear that in mind.

MR. WINTON: I will argue that at a later time, unless your Honor wants clarification.

THE COURT: No, I think I understand.

Q These exhibits which have just been put in, are the type of report that Dairylea files for the Honesdale plant, is that right?

A Yes.

Q Is a similar report filed and a similar assessment by the Market Administrator received for November, 1972?

A Yes.

MR. WINTON: I asked that there be marked for identification separately the report filed by Dairylea for the Honesdale plant for November, 1972 and the Market Administrator's calculation of the pool obligation.

MR. HARRIS: Your Honor, to save time, if it is the same two reports for the next month, we will stipulate them into evidence.

THE COURT: All right.

MR. COPELAND: May we have copies of them?

MR. WINTON: Yes, I will give them to you in a minute, as soon as I get them marked.

The exhibit I am now offering, which is now being marked is the report filed by the handler, and the second one is the assessment of the pool obligation made by the Market Administrator.

(Plaintiff's Exhibits 7 and 8 marked for

identification.)

MR. WINTON: I offer these in evidence.

MR. HARRIS: No objection.

(Plaintiff's Exhibits 7 and 8 were received in evidence.)

xx MR. COPELAND: May I remind Mr. Winton that we have not yet received copies.

(Handing.)

THE COURT: Is Exhibit 7 the report made by Dairylea?

THE WITNESS: Yes.

THE COURT: And 8 is the market pool obligation?

THE WITNESS: Yes.

Q The reports which have been received in evidence for the months of October and November 1972 represent all the reports that Dairylea filed with respect to the milk in controversy in this case?

I am talking about just --

A About Honesdale.

Q Yes.

A Yes.

Q Who filed the reports for the Salem bulk tank milk?

A Johanna Farms.

Q In the regular course of business do they furnish copies to you of those reports?

A Yes, they do.

Q Is that required in order to ascertain the prices which they are required to pay you under the Order?

A Yes.

Q I have handed you what purports to be a form filed by Johanna Farms as to receipts and a billing from the Market Administrator to Johanna Farms for equalization roughly in the same general format as the prior exhibits.

Can you tell me what those forms are?

A The first one you handed me is the report that Johanna Farms files with the Market Administrator giving the report of receipts and utilization of milk at that plant.

The second is the calculation of the net pool obligation by the Market Administrator, which is sent back to Johanna Farms.

THE COURT: Let us mark the first one, the report from Johanna Farms as Plaintiff's Exhibit 9 for identification and the one marked pool obligation as Plaintiff's Exhibit 10.

(Plaintiff's Exhibits 9 and 10 marked for

xx

identification.)

THE COURT: How much further along do these reports take us than what you already introduced in respect of Plaintiff's Exhibit 4, for example? What illumination are these reports giving us?

MR. WINTON: One of the questions raised has been to the standing of Dairylea and we, of course, have said that it is irrelevant whether they are handlers or not. But what these reports show is that as to the Salem bulk tank milk the Market Administrator has treated Johanna Farms as the handler. So that certainly as to that milk there would be no question of the standing.

There they have been treated as not a handler but simply --

THE COURT: These reports are in terms that go to the status of Dairylea.

MR. WINTON: Yes, your Honor.

MR. COPELAND: If your Honor please, there is an issue as to whether or not Johanna Farms or Dairylea is a handler with respect to Salem milk.

THE COURT: That is what Mr. Winton said. I was trying to find their relevance. He said he was introducing these exhibits to show that they are not a handler.

MR. HARRIS: We have no objection to the exhibits, your Honor, but I should point out that Exhibit 9 was filed by Johanna Farms. In so far as Johanna Farms made a designation as to the status of Dairylea, that is hearsay. With that understood, we have no objection of it going in as a record filed by Johanna Farms with the Market Administrator.

MR. COPELAND: Our objection, I suppose, would go to Mr. Winton's at least allegation that this handler report proves the fact that Johanna is the handler with respect to this milk.

MR. WINTON: I said the fact that the handler was billed for it on audit is what proved it. Exhibit 10, if your Honor would note, is not something that the handler prepares but a billing by the Market Administrator based on his acceptance --

THE COURT: I understand that. What you are introducing is to show that at least these forms that the Market Administrator has treated the Cooperative as a handlder in respect of Honesdale.

MR. WINTON: But not in respect of the Salem milk. In respect of the Salem milk he's treated it as a producer representative.

THE COURT: All right. I think that that

issue, gentlemen and lady, will have to be the subject of post-trial memoranda related to what these documents prove and what they don't prove.

MR. COPELAND: If your Honor please, I think we will be able to develop some evidence with respect to that.

THE COURT: That is better. All right.

Q I show you the same type of report by handler and Market Administrator's pool obligation computation.

The report having been filed by Johanna Farms for November, 1972, and the calculation having been made by the Market Administrator by that month --

THE COURT: If that is the purpose of it, I'm sure, if we don't get a stipulation to that effect, I will have to introduce it. But I am sure that Mr. Harris and Mr. Copeland will stipulate that reports similar to Plaintiff's Exhibits 9 and 10 for October were filed in November.

MR. COPELAND: Yes, sir.

MR. HARRIS: Yes, sir.

MR. WINTON: That is the only one left.

THE COURT: We do not have to accumulate the record.

MR. WINTON: May I ask if they would also

stipulate that the reports covering the Salem producers who switched in May and June were filed only by Johanna Farms and were included in the billing assessment, same type as this, to Johanna Farms for those months.

MR. COPELAND: If that is a fact, we will so stipulate.

MR. HARRIS: We will so stipulate.

THE COURT: All right.

Q Mr. O'Brien, will you explain to the Court the way the base excess plant in Order 4 operates and how it affects the plaintiff?

MR. HARRIS: Objection, your Honor. The plan speaks for itself. It is in evidence, or will be marked in evidence. In fact, it is a published record and doesn't have to be in evidence. It is part of a code of Federal regulations.

MR. WINTON: I asked him how it operates in fact, not what it says. But the effect of it on the plaintiff.

THE COURT: I will allow it.

Objection overruled.

A The base excess plan as operated at the present time calculates a base for each producer under the Order on the basis of his production during the August through

December period in one year, which will be the basis for his payment during the following 12-month period beginning on March of the following year and going through February of the second succeeding year.

Q Perhaps it would be easier if we put it, but this is where there is considerable confusion --

MR. HARRIS: May we come up to the front, because we cannot see the board on this?

(Mr. Winton draws on the blackboard.)

Q Mr. O'Brien, taking the period of January through October, 1972, under Order 4 what is the base for that, for an existing producer?

A For an existing producer the base during the January-February period would be determined by his production during the August through December, 1970 per[illegible]

Q The shift in '72 would be determined in '71, wouldn't it?

MR. HARRIS: Objection, your Honor. The witness answered the question.

THE COURT: There is no point in having this information on the record so that I think that that is -- the objection is in order. But I think you and your witnesses better get together.

MR. WINTON: Your Honor, he was right. I was

wrong. There is a split at March and I hadn't indicated it.

THE COURT: Let us start again.

Q For the deliveries in January and February, 1972, what is the base for a producer who had a historical basis previously delivering under the Order?

A The base would have been determined by his production in the August through December, 1970.

THE COURT: I understand this -- let me make this clear.

I understand there is a distinction between the one who is already under Order 4 and new producers who come into it.

MR. WINTON: That is one of the points, and I can skip part of what I was going to illustrate. What I want to illustrate is for the month of October --

THE COURT: As to a new producer or old producer?

MR. WINTON: The difference between a new and old producer say for the month of October. This is the important one because most of our case relates to this.

THE COURT: What was the testimony that Mr. O'Brien just gave?

MR. WINTON: That was for January and February.

THE COURT: For an old producer or new producer?

MR. WINTON: For an old producer.

For a new producer in January and February, 1972, he would not have a historical base, would he?

THE WITNESS: No.

Q What would his base be?

A 60 per cent of his actual production.

THE COURT: When?

THE WITNESS: In that period of time.

THE COURT: In January and February?

THE WITNESS: In each month, yes.

Q That would compare to a historical base of how much for old producers?

A Approximately 90 per cent.

Q When you get to October, you are in the base-making period, are you not, for 1973?

A The base-making period beginning --

THE COURT: Before you move on, I am sorry to interrupt, and I hope I am not disrupting you presentation. But I want to be sure I understand this. I think I do. I want to be sure.

I understand that a new producer under Order 4 in January and February is allowed a basis of 60 per cent of his actual production in January and February. And you

answered the question that would be 90 per cent to Dairylea. Does that mean that if you were given, if he had the base was calculated on the basis of production in August to December, 1970, is that what you mean?

THE WITNESS: ~~MR. WINTON:~~ That is right.

THE COURT: If that were the standard utilized then he would have 90 per cent of his production in January and February, would be the base accorded in that year; is that correct?

THE WITNESS: Yes.

THE COURT: All right.

MR. WINTON: Particularly when we got to October, 1972, which represents practically our entire case, a producer is shipping there, what season is that?

THE WITNESS: That is known as the short production season.

Q That is the period when milk is needed?

A Normally, yes.

Q In that period on his current shipment which he is making in october, what is his base?

A In October his base would be 70 per cent of his actual production.

THE COURT: We are still talking about new producers.

MR. WINTON: A new producer.

Q But if he had a historical base and was one of our producers, your figures would show what would his base be?

A That again woule be approximately 90 per cent.

Q That is on his current deliveries. These deliveries also go, do they not, to establish his base for the period beginning March, 1973?

A Yes.

MR. WINTON: It's important to distinguish, if your Honor please, between what we are fighting about, which is the right to get the full price for current deliveries in October, November and December, which would be based on the base in this period, and the fact that these months also establish the base for the ensuing year.

THE COURT: All right. But I want to be sure I understand, Mr. O'Brien.

The October to December and therefore -- December of this year -- and therefore January to February of the following year of your producers, a person's new coming in under Order 4, is 70 per cent of the production in that period; is that correct?

THE WITNESS: In October and November, and it

drops to 60 in December, January and February.

THE COURT: As opposed to the intervenors, who Mr. Copeland is representing, what is the difference? That is, Mr. Copeland is representing, as I understand, persons who already have been for some time under the Market under Order 4.

What is the distinction between your group as new producers as Mr. Copeland's clients as, I guess, old producers?

THE WITNESS: The old producers receive -- I should say the market average of base milk is about 90 per cent.

THE COURT: Is it or isn't it? Is it 90 per cent?

THE WITNESS: It varies, sir, between probably 88 to 92, depending on the individual months. But it stays very close to a 90 per cent figure.

THE COURT: What is an old producer, one who's been under Order 4 for over a year, or how long is one under Order 4 before one becomes entitled to a 90 per cent percentage of production as opposed to a new producer who gets 70 and then 60?

THE WITNESS: If a producer had been in the market during the previous August through December period --

THE COURT: 1971?

THE WITNESS: 1971, yes, he would have his base pounds determined by his production in that period. Since there has been a general increase in production over a period of time, these pounds of milk when it comes to the actual paying period, have approximated for the market as a whole, about90 per cent of the milk actually produced for the market in the subsequent months.

THE COURT: So the periods that you have to qualify runs from August to September of the preceding year. When you come in in October, that is when -- October of the preceding year, that is when the calculation goes to 70 and 60 per cent: is that correct?

THE WITNESS: Yes. The market ~~relation~~ regulation has a series of percentages in there to be assigned to a new producer.

THE COURT: As of March of 1973 the Dairylea producers will be on the same status as other persons; is that correct, old producers?

THE WITNESS: That's correct.

Q I hand you, and this may clarify the question, a document which I ask to be marked for identification.

(Plaintiff's Exhibit 11 was marked for identification.)

Q Will you explain what Exhibit 11 is?

A This is the overall calculation by the Market Administrator in which he summarizes the reports of all the handlers under the market Order showing what the total volume of Class 1 producer milk in the market; Class 2 producer milk; and a computation of the weighted average and the base milk price and the excess price.

Q This is done monthly by the Market Administrator?

A Yes, it is.

MR. WINTON: I offer it in evidence.

MR. COPELAND: What month?

MR. WINTON: This one is November, 1972.

MR. HARRIS: No objection, your Honor.

(Plaintiff's Exhibit 11 was received in evidence.)

Q Does the Market Administrator announce the amount of the milk in the month which is base milk?

A Yes, he does.

Q Where is that figure?

A Very near the middle of the page, there is a line which says in large print "Weighted Average Price 3-1/2 Per Cent, At $7.08."

That is the weighted average price.

The three lines under that is base milk value

and in this case it gives the base milk value, but it also gives the pounds of milk in the first column, which is 332,822,274 pounds.

Q From that you can calculate the percentage of the total pool for the month, which is base milk?

A Yes. Taking the 332 million figure as a percentage of the figure up near the top of the page, total producer milk, would give the percentage that the base milk is of the total production.

Q You have testified that that is approximately 90 per cent for the insider or regular producers under Order 4?

A Yes. It varies right around 90 per cent. It goes a couple of percentage points up or down from that.

THE COURT: 90 per cent, this is for everybody, isn't it? Aren't these figures for everybody?

THE WITNESS: For everybody who has a base.

THE COURT: But new producers and old producers.

THE WITNESS: Yes.

THE COURT: They would be 90 per cent of what? Of $7.25 or what would they be allowed?

THE WITNESS: No --

THE COURT: Or is the 90 per cent of the 332 million?

THE WITNESS: I am referring to the pounds figure in the column, pounds of milk. Where it says base milk value, the 332 million-pound figure taken as a per cent of the figure up near the top, which is on the third line, 364 million pounds, which is total producer milk, this works out to approximately 90 per cent.

Q And that means that the producers in the pool are getting approximately 90 per cent base milk prices for the month of November, 1972?

A Yes.

Q Whereas, the plaintiff's producers for that month are getting 70 per cent?

A That's correct.

Q Have you made a calculation as to how much the denial of bases affects the returns of the plaintiff's producers, in this suit? Approximately what percentage of their returns?

A On a percentage basis it comes out to about a 10 per cent reduction in income.

Q The base excess plan presently in effect came into effect in August, 1970, did it not?

A Yes, it did.

Q Was there a difference between the base excess plan under the present order and under the prior edition or version of the present order?

The one that was in effect before August, 1970 in respect of base and excess milk, and I particularly ask you to address yourself to the payout in the base forming periods?

A Yes, there was a difference. The current plan has a -- the bases are effective over a 12-month period, whereas the earlier plan which was in operation from 1967 up until the operation of this current plan in 1970, provided a base forming period of July through December, during which period of time the producers were paid a uniform or blend or weighted average price for the milk. And the bases were applicable in the following months of March, April, May and June; so that they received a base and excess price only in the four months period, rather than in the 12 months period.

Q Under the prior form of the order, the base paying periods were limited to the flush months?

A Yes.

Q What were the months March through June?

A March, April, May and June.

Q So the restriction on a newly entering producer

would only apply to those flush months; is that correct?

A Yes.

Q And a producer who entered in the base forming months, say October of the year, would there be any restriction on the payments that entered on him?

A No, he would get a uniform price just like any other Order producer.

Q There was no base period limitation applicable during those base forming months?

A No.

Q Whereas under the present order in the short period there is a base restriction and you don't get the full production, even though you deliver it in a short period; is that correct?

MR. HARRIS: Objection to leading.

THE COURT: Objection sustained.

Mr. Winton, you have introduced Mr. O'Brien as an expert witness. He ought to be able to testify without your making suggestions to him.

MR. WINTON: Your Honor, I willtry to observe that. It's merely, I find the subject matter fairly difficult to state, and I address the witness' attention.

THE COURT: I would suggest that over the lunch hour you find a way.

MR. WINTON: I will try.

I think this is a good point, if your Honor please, to break.

THE COURT: I gather, Mr. Kolber, I will have to make you an official member of this Court.

(Mr. Stanley M. Kolber was duly admitted to the bar of the United States District Court, Southern District of New York.)

THE COURT: I think you have to sign something.

We will adjourn until two.

Mr. Winton, I expect, if you are going to make any amendment to your complaint, I would expect you to advise me by two o'clock.

MR. WINTON: We have a problem. We'd have to speak with some of the clients. Perhaps I could have until tomorrow to do that.

THE COURT: No --

MR. COPELAND: If your Honor please, we'd like some notice, too.

THE COURT: In view of what I said this morning, I am not really interested at this point in the Government's position on that, or yours. But I do think that if the case is probably going to end tomorrow, that we ought to know before tomorrow whether or not you are

going to intervene.

MR. WINTON: My problem is this, if the Court please.

If we could get some indication, if your Honor is going to sustain our position, it would be unnecessary to bother you --

THE COURT: I have indicated to you at the outset that I am not disposed at this time to make any determination of that, and I think that when I tried to indicate to you, I think that you had better take your action on the theory, not on the most favorable theory to your position, but on the theory that you think is most adverse, as a matter of caution. I indicated that to you this morning.

You have until two o'clock. I would like you to make some disposition and give it some idea when you go back.

(Luncheon recess.)

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AFTERNOON SESSION

(2.05 p.m.)

MR. WINTON: If the Court please, I have conferred with my client about the question of intervention. We have authority from three producers to intervene, but we have a technical question. Unless this is resolved we are not prepared to have them intervene. I have authority to myself, written authority.

The question is this: These producers are not residents of New York. If a question of venue is going to be raised, I would like to know it right away, otherwise we will intervene.

THE COURT: You know the question of venue is going to be raised. There is no question in my mind that the question of venue is going to be raised. You know that the Government and the intervenors are going to raise every possible defense they can.

One, to get it out of the jurisdiction of this court. I think you have to consider that.

MR. WINTON: Then let me suggest this procedure. Could I file these authorizations and not make a motion to intervene, to show that it is at most a technical objection to the Court's jurisdiction, and that it has no validity.

By the way, may I ask if your Honor has had a occasion to read the memorandum which we filed yesterday on jurisdiction?

THE COURT: I have read both memoranda and I must say I haven't had an opportunity to go through them thoroughly. My reaction at the present time is to favor your position, Mr. Winton, but it seems to me -- I haven't read the Government's reply, though, which was handed up today. But the reason that I am not making any pronouncement is because I haven't gone through it.

Your position seems to me to be the way of logic, and so forth, but it may well be that the decisions won't sustain it. So I can't tell you on my own if -- after I have gone through it more thoroughly -- if decisions would appear to uphold it, I would of course take your view. I might add that I do not believe that that letter of November or January 11 changes the matter in any regard.

It seems to me the question is not that the Secretary of Agriculture is going to give you the right, which he had ordinarily denied to you, of administrative ~~management~~ remedy, but that you had to pursue the remedy, which is the issue in the case. Thus, the exhaustion problem is not going to turn on that, that I am sure of.

Whether your position is going to be sustained, after research, I just can't tell you.

MR. WINTON: I understand, your Honor.

Would you object to introducing here just as an exhibit the authorization we have, but are not going to intervene. Let me have it marked for identification at this point.

MR. HARRIS: We will object.

THE COURT: I am not going to have any objection to that, obviously. But the point is, that to me, the fact that you filed it doesn't meet the problem, if there is a problem. So I don't see that anything is going to be served by that. If you want to file it, file it. It seems to me that you need individual producers in this case to meet the jurisdictional problem, the mere filing of an authorization isn't going to do it if you don't have them as parties. So again, it's not a question of -- well, it's your ball game.

MR. WINTON: I agree with you Honor. I think in view of the venue question and as I understand the defendants will not waive the venue question, from prior discussion, we will not move to have these intervenors intervene, and we will rest on the standing of Dairylea as a representative of the producers.

THE COURT: All right.

MR. WINTON: As long as we have had this recess, if your Honor please, I would like at this time to offer in evidence a clearer copy of the secretary's decision of May 22, 1970, which is the decision which promulgated this order. I think you will find that easier reading than the Xerox.

THE COURT: All right. The Xerox copy is in evidence?

MR. HARRIS: No, that was the one I handed up to your Honor.

THE COURT: I do not think we need it in evidence. The order is published. It's a Government document, is it not?

MR. WINTON: Yes, it's in the Federal Register. The Court can take judicial notice.

THE COURT: Thank you. I will.

MR. WINTON: I would also like to furnish your Honor, I believe this was handed up by the Government, but if it hasn't been, a copy of Order NO. 2.

THE COURT: I have that. Mr. Harris gave it to me.

MR . WINTON: And I believe Mr. Harris has also given you this Order No. 4.

THE COURT: Yes.

MR. WINTON: It is stipulated, is it not, that these orders are the forms that were in effect during the period.

MR. HARRIS: Involved in the lawsuit, yes.

MR. WINTON: Yes.

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G E O R G E O ' B R I E N , resumed.

DIRECT EXAMINATION (Continued)

BY MR. WINTON:

Q Would you tell the Court what the reason was why Dairylea shifted producers involved in this suit from Order 2 to Order 4 regulations?

A Yes.

Johanna Farms is a handler operating under Order 4 and has been expanding his business on a regular basis, and we are the supplier for Johanna Farms by an agreement which we have with them. And in order to meet his additional needs for milk we did put additional producers into his facility.

THE COURT: Additional producers? Is that the same as your supplying him with more -- I suppose that is the same thing -- but more milk?

THE WITNESS: Yes. By virtue of the Salem

bulk tank producers going in and we shifted the ~~plants~~ plant at Honesdale, Pennsylvania, to the Order 4 market to supply it.

THE COURT: Dairylea is still in an Order 2 market; is that correct?

THE WITNESS: Dairylea has producers whose milk is regulated under Order 2 and Order 4, plus other Federal order markets.

THE COURT: Just getting this down to where I know where we are, I may be wrong about this, but I'd say the Order 2 market is the New York market and these parties are in the Order 4 market, which is Pennsylvania. You were supplying Pennsylvania, the Johanna people, with a certain amount of milk, but it wasn't sufficient to come under the Order 4 regulation until you increased it; is that your problem?

THE WITNESS: Yes, sir.

THE COURT: So you entered the Order 4 market from Order 2 and you increased your supply, or rather increased -- yes, increased the supply of milk supplying this farm so they therefore had to come under the Order 4 regulation.

THE WITNESS: Yes, sir.

Q Will you explain to the Court too why the shift

was made for the most part in October, 1972?

A We would have shifted the ~~plant~~ plant and the bulk tank unit milk to the Order 4 market earlier, but because of the arbitrarily assigned bases that the producers would have received we waited until the last possible minute, which would be October, for a method whereby we would keep our losses to a minimum. Because by going in on October 1 the Order 4 market does recognize that these producers' production as Order 2 producers under -- for the months of August and September as well as then the ensuing months of October, November and December under Order 4. So that on that basis they would have full bases starting the following March 1.

This way, by putting them in on October 1 instead of at an earlier time, we were able to keep our loss at a minimum.

Q The bases Order 4 and its form now in effect gives if you enter on October 1st, they only apply for the ensuing year; is that what you are saying, beginning March 1st?

A Beginning March 1 through the following February.

Q But do you get any credit under Order 4 if you enter in October with respect to historical bases for deliveries whi ch you are making in October, 1972?

A No. The Order 4 would not recognize the production of these producers in October. They wouldn't use the previous year, August through December base making period. ~~That~~ That would be ignored.

Q So that for current deliveries there would be the assigned arbitrary bases as far as base and excess payments are concerned?

A Yes. For the five months' period until the producers actually have a base assigned beginning the following March 1.

Q Let me ask you this;

The terms flush season and short season I think have been used. Will you explain to the Court what that is and what it means?

A The flush season is the time of the year when the cows are giving the most amount of milk, which is usually the March, April, May, June period. And the short season usually starts in July and extends through the end of the year, beginning into the first part of the following year.

Q What is the cause of this variation between the short season and the flush season?

A The fact that the dairy cow is a biological animal. It normally breeds so as to have its calves in

the spring and therefore gives a much larger amount of milk at that time of the year.

Q There are plans adopted for seasonal leveling of production. Will you explain what is meant by seasonale leveling of production?

A Seasonal leveling of production is an incentive to produce milk on a relatively level basis throughout the year. This is done by an incentive for the producers to raise their marketings in the fall and reduce their marketings in the spring.

Q Are markets normally or tend to be short of milk in any part of the year, and if so, what part of the year?

A If they are short of milk at any time of the year it would be in this short production season. Usually from say July to December period. Could be any of those months.

Q What is the economic value of leveling production seasonally and to whom does that value accrue?

A The economic value of leveling production is primarily to the handler or cooperative involved in doing the balancing or the seasonal balancing for that market.

In the case of a cooperative, if a cooperative does provide the manufacturing facilities to handle the

surplus or excess production of milk during the March, April, May and June period, they have substantial costs. To the extent that the production can be leveled seasonally, it provides a more efficient method of handling surplus milk. In other words, they don't have to have excess capacity to meet a short period of time which would be standing idle for the rest of the year.

THE COURT: Mr. Winton, isn't all of this surplusage? The purpose of the Act, you are not contesting that. Isn't the real question that you raise here, the issue of discrimination?

MR. WINTON: Yes, your Honor.

THE COURT: Between the old producers and the new. Why don't we get that issue?

MR. WINTON: We have one other issue, and that is that this is an unauthorized seasonal plan. It is our contention that a seasonal plan cannot limit, as this does, the production of milk in the short season. The purpose of the seasonal plan is to encourage production in the short season so the market won't be short of milk. And that ~~his~~ this plan in addition to being discriminatory, is illegal. That is a subsidiary issue.

THE COURT: All right. But the point is that I have the impression that you are having Mr. O'Brien

testify to things that are irrelevant to those two issues.

MR. [illegible]NTON: I will tell you what we have in mind.

The Zuber case in the Supreme Court held that a differential in payment between two producers could only be based on economic value, something of economic value. And it said that these particular adjustments, including the one for seasonal adjustments, had to be based on the record showing a difference in economic value.

THE COURT: All right. I will allow it.

All right.

Q Let me ask you, if there is a lot of production, I will give you a hypothetical case assuming a market where the flush season is, say, one and a half times the short season production, and that as a result there is a lot of milk in the flush season which has to be manufactured.

In that case I understood your answer, and I am not sure that is clear, to mean that a cooperative with manufacturing facilities would have to have enough manufacturing facilities to handle all that excess milk not used for fluid purposes, is that correct?

A That's correct, yes.

Q And that if the production fell off in the short season, what would happen to those manufacturing facilities?

A They would sit idle for the rest of the year or during the short production months.

Q That would mean no return on the investment in those facilities during the short season?

A That's correct.

Q If you have level production how would that be affected, assuming the same amount of milk came in and that you only had a level surplus all year round?

A Under that circumstance the cooperative can utilize these manufacturing facilities on a more efficient basis and use them each and every month and keep them relatively full of milk to become a more efficient operation, rather than a drain to the producer members who pay for the cost of these facilities in the first place.

Q Is there any other benefit, economically speaking, that accrues from level production?

A Only to the individual producers in that to the extent that the individual has relatively level production he is able to have facilities on his farm to accommodate to that situation. Such as the size of the bulk tank on his farm in which he stores milk, if he utilizes that relatively the same amount each and every month of the year, and similarly with the cost of transporting the milk from the farm to the market. If he has very seasonal

production it is goingto involve substantial additional hauling charges in the flush months as contrasted to the short season.

Q Are those considerations, considerations which properly redound to the benefit of a handler or the pool?

A Those would be to the individual farmer.

Q But they would not concern the handler or the cooperative?

A No.

Q Let me address your attention to the situation of two producers, one who had been in Order 4 for a period of years and was giving a historical base, one who came into Order 4 in October, 1972, and let us assume that both producers had equally level production. Under those circumstances what, if any, difference would there be between the economic value of the two producers' production?

A None.

Q Would the cost of leveling production for a dairy farmer in the production area, which is common to Order 4 and Order 2, that is in the secretary's decision, if your Honor please -- be any different in point of fact?

Would it cost an Order 4 farmer more to level

his production than an Order 2 farmer?

A No.

Q If an Order 2 producer who had not been under Order 4 entered the market in October, would that have burdened the production year which began in the prior flush season on more or less than the production of a producer who was already in and delivering during the flush season?

A It would depend upon what his milk was used for. In the instance where he put milk in it was used primarily for Class 1 and therefore benefited the Order 4 pool.

Q I was trying to address your attention to the fact that a producer who entered the market for the first time in October, 1972 would not have been burdening, would he, the pool with his flush production in '72?

A No, he would not have been associated with the market.

Q So he would have been supplying market milk to Order 4 at a time when it was needed, would you say, most needed?

MR. HARRIS: Objection.

MR. WINTON: I will withdraw the question. I will try to get it other ways.

Q What I am trying to address myself to is, when a producer enters the Order 4 market for the first time in October, is he costing the pool more or less relative to the flush period in March through April of the year in which he entered?

Take a producer entered October, 1972 and had not been shipping on the Order 4 pool in March, April, May and June. What is the effect of that on the pool?

A There would be no adverse effect on the pool at all.

MR. WINTON: I would ask that this schedule be marked as an exhibit for identification.

(Plaintiff's Exhibit 12 was marked for identification.)

xx Q Would you explain what Plaintiff's Exhibit 12 is and who prepared it?

A I prepared the exhibit. This is indicators as to how the shifting of the Honesdale plant and the Salem bulk tank unit to Order 4 has helped the Order 4 producer price.

Q Would you explain the schedule?

A It shows that in the top part of the table what the producer receipts were a year ago in August through November and in August through November, 1972. And from

September to October of 1972 there is a relatively large increase in producer receipts, and that reflects the increase of the Salem bulk tank unit and the Honesdale plant to the Order 4 market.

However, it also shows in the next column how this affected the Class 1 pounds in the market between September and October of this year, as contrasted to a year ago. And therefore, the percentage of milk used in Class 1 in the last column increased from September to October this year as contrasted to a decrease a year ago.

Q What was that the result of?

A This is the result of this milk going into Johanna Farms and being utilized primarily as Class 1 milk.

Q Would you explain in general how the percentage of Class 1 milk in the market affects the blend OR uniform price in that market?

A Well, the Class 1 milk is priced at the higher level and the Class 2 milk or the manufacturing, the milk that goes into manufacturing, is priced at a lower lower level. And as the percentage of the milk actually marketed in the Class 1 category increases relative to the Class 2 milk, you have a higher weighted average resulting from that available for the individual producer

who is delivering to that market.

Q What was the effect of the shifting of the producers involved in this case on the total Class 1 use in Order 4?

A Since most of this milk was used in Class 1 under Order 1 4 it would have raised the utilization under the market.

Q In Class 1?

A In Class 1, yes.

MR. WINTON: I offer this in evidence.

MR. HARRIS: No objection, your Honor.

(Plaintiff's Exhibit 12 was received in evidence.)

xx MR. WINTON: I believe your Honor has a copy of this compilation of Market Agreement Act of 1937 prepared by the Department.

THE COURT: Yes.

MR. WINTON: It looks like this. I would ask your Honor and the witness to address themselves to page 8 of this pamphlet and clause (d), which is about an inch and a half down. It starts:

"(d) A further adjustment to encourage seasonable adjustments in the production of milk through equitable apportionment of the total value

of the milk purchased by any handler or by all handlers among producers on the basis of their marketing of milk during a representatie period of time."

Q Bearing this phrase in mind, I ask you to describe what the value of milk produced in the flush months of the year, basically April, May and June, is as against the value of milk produced in the short season, basically August through December.

MR. HARRIS: I object to that question.

First, I am not sure I understand it.

Second of all, when he said bearing that in mind, meaning the statute, I am not sure whether the question relates to the statute or what the witness means in general, or what.

If he is asking this witness to testify what the statute means, then we object, of course, on the ground that the statute speaks for itself and there is legislative history which Mr. Winton amply cited in his brief and there are cases interpreting the statute.

MR. WINTON: I am not asking that. I am merely asking the witness to address himself to the phrase "equitable apportionment of the total value of the milk," in trying to find out the relative segments of the year's

production, how much they are worth one as against the other.

THE COURT: Objection overruled.

A The value of the milk --

THE COURT: Mr. Harris, do you understand the question?

MR. HARRIS: I am not sure I understand it.

MR. WINTON: Shall I answer --

MR. HARRIS: I don't want the answer.

THE COURT: I just want to be sure he understands the question.

MR. HARRIS: If he is asking the witness to describe what this term equitable apportionment --

THE COURT: He is attempting to get, I think, from the witness in terms of seasonal -- in terms of flush as opposed to short season the total value phrase under (d).

MR. WINTON: That's right.

Q The question in substance is, what is the value of the milk produced in the short season as against milk produced in the flush season?

A The value of milk is less in the flush season than it is in the short season.

Q That is a general proposition of dairy economics, isn't it?

A Yes, it is.

Q Does there exist what is called a spot market, where fluid milk is traded in from time to time on a daily basis --

MR. COPELAND: Objection.

Q Just a minute. Let me finish. And prices are reported by the U. S. Department of Agriculture?

MR. COPELAND: Object.

THE COURT: I am sorry, I was having some problem hearing.

Read the question back.

(Question read.)

MR. HARRIS: Your Honor, this is a leading question. Why doesn't he ask, does he know what a spot market is, or such a thing.

THE COURT: The objection is sustained.

Not only is it leading, but I don't understand it.

Q Do you know what the spot market is?

A Yes. The spot market is the actual price that handlers have to pay for milk at any particul period of time in order to get a supply of milk. This is usually milk which is sold by handlers to other handlers, or by brokers to handlers, and it is, the quotation is published on a weekly basis by the Department of Agriculture in the

Dairy & Poultry Market News.

Q Is it Grade A or Class 1 fluid milk?

A It's milk for fluid purposes, yes.

Q Have you compiled a schedule showing the prices for such spot milk for January through December, 1972?

A Yes, I have.

Q Is this it?

A Yes, it is.

MR. WINTON: I ask that this be marked for identification.

(Plaintiff's Exhibit 13 was marked for identification.)

xx

Q Will you explain what this schedule is and the source?

A This schedule shows the spot market prices for the New York-New Jersey metropolitan marketing area for the year 1972, by weeks, showing what the actual price was for a 40-quart or 85-pound unit of milk.

THE COURT: The New York-New Jersey market, isn't that under Order 2?

MR. WINTON: Yes, your Honor, but that is what I was going to bring out.

Q Are those prices fairly representative of the value of fluid milk in the northeastern area?

MR. COPELAND: I object, your Honor. I don't see the relevancy of it. We are talking about Order 4.

MR. WINTON: This isthe price at which it sells on the open market, your Honor, not the minimum price required by the order. But just its fair trading value. The purpose of this is to show that the price of milk runs considerably higher in the short season on an open market basis. This open market milk, just to show the normal pattern, is that it is more valuable in the short season.

THE COURT: Let me tell you my problem with that, and you can address yourself to it. I think it's too long past forany contention, at least in this court, that the Government in order to protect both the public, I suppose, and the producers and handlers, is not able to regulate the market as far as milk is concerned. I think that is settled.

The question of the free market, therefore, seems to me to be irrelevant. The issue as I see it here, and the only issue that I see in the case and the subsidiary issue, is the issue of discrimination among how Order 4 handlers and producers, as between old and new.

The question is whether if this statute was in operation, the secretary did not have the power to regulate what you could get on a free market, it seems to me that

was settled when I was in law school, in 1937 some time.

MR. WINTON: We are not challenging that. We are trying to address ourselves to what part of the total value of a year's milk can equitably be attributed to the flush. And what we have here is just showing week by week how the prices in the free market vary to show not that the secretary can regulate it, but rather, in attempting to apportion the total value of a year's production he must take into account the fact that the short season production always sells for more than the flush season production.

We are not trying to do anything except to show the pattern of prices. We have a subsidiary schedule which shows that that has been true since 1948, that the short season prices on the open market are always higher than the flush season and therefore it's inequitable in our case where we came in in the short season, to penalize us.

THE COURT: I don't know very much about this, but isn't that elemental? Isn't that the whole purpose of this scheme, in any regard?

I don't know, maybe Mr. Harris and Mr. Copeland are going to require you to prove that.

MR. HARRIS: No, your Honor. The scheme was

that prior to the statutory regulation milk pricing jumped up and down. One of the factors was that in seasons where there was a lot of milk, prices would be lower. In seasons where there was only a little bit of milk, prices would be higher. All of this disrupted the market; it was bad for the consumers, the farmers, and so forth. So Congress passed a law.

The open market has nothing to do with this case. We are talking about the regulated market.

MR. WINTON: I was only trying to show that in order to get an equitable apportionment of the total value, you had to take into account that short season milk is worth more than flush season milk, and in our case almost all our milk went in in the short season, and yet we are getting less than we would have gotten, even though we only brought the milk in in the short season at the maximum price level, we have been discriminated against. At this time milk was very valuable, and far from riding the order, we were being penalized for supplying milk when it is needed. But if your Honor thinks this is irrelevant, I would just ask that these be marked for identification.

MR. COPELAND: Your Honor, they purport to refer to Order 2 in any event, and secondly, there is nothing in the order which requires a handler pay more

than -- prevents him from paying more than minimum price. The whole thing seems to me to be irrelevant.

THE COURT: I think I understand it, in any event. Maybe you will have to put it in if I don't. All it seems to me that you are saying is, that for the period when you come into the market in October of 1972, that not having a base which includes your flush season, that you are restricted to 70 and 60 per cent during your short season, whereas, as a matter of fact, you think that if your flush season were -- the base were utilized, you would have come out much better. Isn't that all you are saying?

MR. WINDON: I use a little different words, but the substance of it is correct. Namely, we think that an equitable apportionment of the total year's supply must take into account that when we came in we put milk into this order when it had the greatest economic value to the order.

THE COURT: You are saying when you came in, instead of having 60 per cent or whatever it is, in October through this period, that you came in in the market, what the secretary should take into account is August -- whenever the flush season is concerned -- as well as this order, in order to run on a fair figure.

MR. WINTON: That's right.

THE COURT: I think I understand.

MR. WINTON: I do not think this is determinative, but I think it shows the relative values.

MR. HARRIS: I think it shows nothing, your Honor. Just like Mr. Winton said, he wanted to show us the value of Order 4, and this is Order 2. It doesn't show anything about Order 4.

THE COURT: I do not think it is going to help me at all.

MR. WINTON: Anyway, if your Honor please, these are figures which could be judicially noticed because they are published by the Department of Agriculture.

THE COURT: All right.

MR. WINTON: So if they can become relevant your Honor can take judicial notice of it.

THE COURT: All right.

Q Let me address your attention to the difference under the regulatory provisions under Order 4, between a supply plant becoming an Order 4 plant in October, and a distributing plant.

Would you consider that situation and tell me whether there is any economic justification for the fact that the order allows the producers to have a full base in

the case of a distributing plant and only the arbitrary base in the case of a supply plant?

MR. HARRIS: I just didn't hear all of that. Would the reporter read back the question?

THE COURT: Please.

(Question read.)

A I know of no economic justification as to why the producers delivering to a supply plant should not receive a base the same as those producers who deliver to a distributing plant.

Q Is there any difference in the economic value of milk so far as the producer is concerned delivering to the same point between supply and distributing plants?

A No.

Q Addressing yourself to the so-called base excess plant in Order 4, would you relate that to the provisions of the order which -- of the Act which refers to encouraging seasonal adjustments in the production of milk, and explain to what extent they are related economically?

A The plan does provide, that is the current base excess plan does provide incentive for level production. But it does beyond that in that with the 12-month base plan you have a tendency for production to be limited because if a producer wants to increase his production and

take advantage of the labor saving devices that are continually being developed, if he wants to increase his production on that farm, he does it at penalty because to the extent that he produces over his base he receives only the excess price. So that inhibits the increase in production.

But on a 12-month basis of payout, as this plan has, it also tends to limit entry of producers into the market.

Q Is there a difference between the type of plan which has no base applicable to the short season and this type of plan which has a base applicable to the short season, so far as their effect on overall production is concerned?

A Yes. The seasonal base, which would be a limited base applicable period as the one in effect prior to 1970 under Order 4, is a program which does not limit in any manner actual production, because the producers are allowed to increase their production and build a base each year. But under the program of a 12-month base paying period there is a tendency to limit an increase in production because the producer receives only the excess price to the extent that he produces over his base milk.

Q In the short period?

A In the short period or base forming period.

Q Has there been some professional opinion of economists and study given to this problem that has come to your attention?

A Yes, there has. Dr. Johnson, of the University of Connecticut, has written one of his regular newsletters on the subject and it was part of the subject of the speech that he made before the first annual meeting of Yankee Milk Cooperative, in November.

THE COURT: Is that the document that has been introduced?

MR. WINTON: No, this is another one, if your Honor please. That was the one by Mr. Forrest, who is the director of the dairy division, which promulgates these orders.

Q I show you a paper which says "Prepared by Stewart Johnson," and ask you, is that the paper you referred to?

A Yes, it is.

Q Incidentally, this is a Land Grant College, is it not, the Cooperative Extension Service College for Agriculture of the University of Connecticut? It says here issued in furtherance of the Act of Congress of May 8 and June 30, 1940.

MR. COPELAND: I would like to raise an objection to this procedure.

Mr. Winton has been reading things into the record. He hasn't shown them to counsel --

MR. WINTON: I am just identifying it first.

MR. COPELAND: I think you are going beyond identifying it. I would request the Court to make a ruling with respect to how we should proceed with this, because I believe if this is a document which I think it is, it is objectionable.

MR. WINTON: I showed you this before.

MR. COPELAND: I told you we would oject to it.

THE COURT: All he has done is had the title read in. I don't understand what Land Grant College has to do with it.

MR. HARRIS: That is the point, your Honor. That is something on the bottom of the document.

THE COURT: Are you going to mark this?

MR. WINTON: Yes, I will first have it marked for identification to give these gentlemen a chance to object.

THE COURT: They are not going to object until you offer it in evidence. They cannot object if you

offer it for identification. They are going to object when you offer it in evidence, if you do.

(Plaintiff's Exhibit 14 was marked for identification.)

Q Is Dr. Johnson a well known economist?

A Yes, he is.

Q Dairy economist?

A Dairy economist, yes.

Q And his opinion is received with considerable authority in the industry?

A Yes.

Q Is he one of the type of experts that are regularly consulted at Order hearings?

A Yes.

MR. WINTON: I offer this in evidence, your Honor.

MR. HARRIS: Objection, your Honor.

MR. COPELAND: I object, your Honor.

THE COURT: Let me hear the basis of your objection.

MR. HARRIS: First of all, your Honor, it's hearsay. It is an out of court statement by this Mr. Johnson or Dr. Johnson and we have no opportunity to cross-examine him. I don't think it is a recognized publication

analogous to a medical textbook sort of thing, that gets put in for an exception of recognized treatises. This is apparently an article by this Dr. Johnson. It's pure hearsay.

MR. COPELAND: I don't have anything much more to add to that, your Honor.

MR. WINTON: These are Land Grant Colleges which the Congress has established for the purpose of aiding Agriculture to investigate these problems and they regularly are subsidized and paid to publish these studies.

This is one of the studies and they constitute part of the expert literature on the subject of dairy farming. It's the kind of thing your Honor will find was referred to in the Zuber and Lehigh Valley cases in the footnotes.

We have given you a memorandum showing you this kind of study was judicially noticed, as a matter of fact. These facts are not controversial.

THE COURT: But the problem is, the hearsay objection is made, I gather on the ground that this publication, whatever it is, has not been shown to be one that has wide distribution in the industry and one which is a recognized publication, therefore, it could be utilized. It could well be, as I gather the objection,

that somebody puts this out and nobody saw or heard of it, in which event it wouldn't be.

If this is a widespread publication utilized and distributed throughout, I think it would be admissible as an exception to the hearsay rule. I certainly can't rule on that now, because as far as I know, I have never heard of it; I don't know anything about it; therefore, it would appear to me at this point that Mr. Harris' objection is well taken.

MR. WINTON: I can bring more out but I would like to call your attention to page 4 of the memorandum we submitted on evidence.

THE COURT: Is that the one you submitted this morning?

MR. WINTON: Yes, your Honor. It is entitled Plaintiff's Memorandum Re Admissibility of Evidence.

MR. KOLBER: It is not in a back, your Honor. It's loose.

THE COURT: All right.

Give me an opportunity to find it.

(Pause.)

THE COURT: I have it now.

MR. WINTON: If your Honor will turn to page 4, at the bottom of the page you see that one of the things

the Supreme court took into account was an unpublished dissertation on file with the Department of Agriculture and Harvard University.

Another thing they took into account was a report to the Secretary of Agriculture by the Federal Milk Order Study Committee.

Another thing they took into account was an article by HUD, restrictions on the free movement of fluid milk under Federal Milk Marketing Orders. I submit to your Honor that is the same type of evidence. But before your Honor rules I would like to ask the witness a few questions.

MR. HARRIS: There is nothing in Mr. Winton's memorandum where anybody objected to the Court doing that. If everybody stipulated that into evidence, that would be a different situation.

MR. COPELAND: I do not remember. Is there any indication it has any standing?

MR. HARRIS: Then it is nothing but his opinion.

THE COURT: I agree. Of course, they may take liberties in citing references which of course may not be introduced.

MR. WINTON: Let me just ask your Honor to take the same liberties in consulting it.

Q What is that newsletter, or what kind of publication is it?

A It is a monthly publication written by Dr. Johnson for the Extension Service at the University of Connecticut, and is distributed on a fairly broad basis to people interested in dairy marketing, and anybody can get on the mailing list to receive it.

Q Is it generally regarded in the industry as authoritative.

Objection.

MR. WINTON: I am talking now about general opinion.

A Well, Dr. Johnson --

THE COURT: I'm sorry. What is the objection?

MR. COPELAND: I think, first of all, if I understand the question correctly that you asked him whether or not that was regarded in the industry as authoritative.

THE COURT: Mr. Copeland, I can hear you. You do not have to walk all the way up. You can stay back and make your objections.

MR. COPELAND: I beg your pardon.

THE COURT: I will hear from you.

MR. COPELAND: Your Honor, it seems to me that Mr. Winton was asking Mr. O'Brien whether or not Dr. Johnson's statements are authorit tive, are viewed in the industry as authoritative. I think the question is objectionable.

MR. WINTON: I went beyond that and asked whether this newsletter with the University and Dr. Johnson put out for the University is regarded as authoritative. That is what I thought the gist of the question was.

In order to qualify it as expert material relied on by the industry.

THE COURT: I will let you answer the

question.

A Well, Dr. Johnson in some cases presents the paper with the statistical facts and gives a summary of what the statistical facts show. Other times he puts some things in which are perhaps a matter of his own expert opinion, which some other people may or may not agree with.

Q But is he recognized expert, in any event?

A He is a recognized expert.

Q And this is a recognized way of experts in the dairy industry of presenting their opinions to the industry and department.

MR. HARRIS: Objection.

THE COURT: I do not think we are getting anywhere.

MR. WINTON: All right.

THE COURT: I think that I am going to sustain the objection.

MR. WINTON: I hope your Honor will at least reserve the right that the Supreme Court has taken, to consult this type of material.

Q Are you familiar with the development of bulk tank delivery in this milk shed in which

order 4 and order 2 draw their milk from?

A Yes, I am.

Q Will you describe it to the Court.

A The bulk tank form of delivery started in the early 1950's, mainly, and it was a changeover from the method of handling milk from using the individual 40-quart can units to handle milk in bulk form.

Formerly the dairy farmer would take the milk from his cows and put it in these 40-quart can units and the milk would be picked up every morning from the farm on a truck and taken to a plant for processing.

The changeover to the bulk tank method of handling milk meant that the producer installed a large tank in his milkhouse, usually of stainless steel and with refrigeration equipped, and the milk was put into this large bulk tank in the farm milkhouse and cooled; and instead of having milk delivered everyday, it's been on the basis of every other day because the milk was substantially cooled right there on the farm and properly preserved that way for freshness. And the tank truck would then come to the farm and the driver would agitate the milk,

take a sample of it to determine the butter fat content, and measure the volume of milk in the tank, each tank having been calibrated by the Bureau of Weights and Measures and then the milk would be pumped from the farm tank into the over-the-road tank or pick-up truck and hauled into the receiving plant or distributing plant by that method.

Q Did the changeover eliminate a large number of supply plants that used to receive the 40-quart cans of milk?

A Yes. This made it possible for the truck that picked the milk up from the farm to deliver the milk directly in many cases to distributing plants, instead of having the milk delivered to a country supply plant in countries and then consolidated into a large tank truck for delivery to a distributing plant.

Q Under the old 40-quart can system, what was the point at which the milk was weighed, butter fat tests taken and it was mingled with the milk of other producers.

A That was at the plant because at the plant the cans all being coded for the individual producer, his milk was put into a weigh vat at the

plant and a sample taken and then commingled with all the other milk which had been previously received in a storage tank. And the cans would be washed and sent back to the farm. So that it is at that plant that the milk would be measured and tested.

Q And combined with the milk of other producers?

A Yes.

Q Wasn't it at that plant, too, where it was accumulated into big loads which were sent by tank truck?

A Yes, sir.

Q Under the new bulk tank system which now is generally prevailing, isn't it?

A Yes.

Q Where are those functions performed?

A The measurement and the taking of the sample for analysis to determine the butter fat content is done at the farm.

Q Where does the milk get mingled with the milk of other producers and put into a big bulk tank?

A Well, it's pumped from the farmers' tank into the truck.

Q Is there any point after that where you could tell the separate production characteristics, weight and so forth, of each individual producer?

A No.

Q Under order 2 how is such a bulk tank unit which picks up milk treated?

A Under order 2, the group of producers are considered as a bulk tank unit and report to the administrator as a pool bulk tank unit.

Q How are they treated relative to the milk received in cans at a pool plant?

MR. COPELAND: Your Honor, may I interpose an objection at this point. We are talking about order 2 again. I am just wondering --

THE COURT: I was very surprised the objection did not come earlier.

MR. WINTON: They have a common milkshed--

THE COURT: There is an objection.

MR. COPELAND: I am not trying to inhibit Mr. Winton from pursuing his case, but I don't want the record to be unduly burdened, either. I feel at some point that I must interpose an objection. I don't see the relevancy.

MR. WINTON: We are just trying to show

that these bulk tank units are just plants on wheels and that is how the secretary has treated them in order 2 and order 4. I was going to get to order 4, too.

THE COURT: Get to order 4. Order 4 is in issue, isn't it? What difference does it make if he has treated a bulk tank in order 2 as one thing. Couldn't he treat it in order 4 as another, as long as he treats everybody in order 4 in the same way?

MR. WINTON: I think the problem is, he is treating people outside of order 4 differently and we are saying it is arbitrary and unreasonable.

THE COURT: Yes, sir, but to show what he does with a bulk tank in order 2 is not relevant. I sustain the objection. I think you have to show, Mr. Winton, at least as far as I understand this case, that you are going to have to, to make out a case, that you are going to have to show that persons under order 4 were treated differently and discriminated against. If you are going to have any argument in regard to how he treats the tank, then it has to be in respect of differences in the people in order 4.

I am not going to hear any, unless it is

going to that issue, I am not going to hear any evidence about what he does with order 2. The similarity of treatment that you are raising, it seems to me has to be with respect to producers or handlers that are under order 4. That is the issue before the Court.

16/ MR. WINTON: Your Honor, you are right. But we had this for a different purpose than the one your Honor's addressing his attention to. Under the provisions of clause (f), which we haven't yet argued, clause F, which relates to certain safeguards which Congress has put in when there is an extended seasonal plan, requires bases to be given to producers when their plant shifts.

MR. COPELAND: Your Honor, I believe you have already ruled on the objection. I believe that Mr. Winton is arguing with the Court's ruling. May we proceed.

MR. WINTON: I was just explaining that the thrust of this was not to the question the Court addressed its attention.

THE COURT: But the point is, I don't understand how you can complain that in respect of that if the secretary has treated everyone in order 4 with

regard to bulk tanks, has made the same ruling with regard to everybody. I don't care what he's done with respect to order 2. The fact that you as an order 2 producer or handler, you come under some different kind of regulation; the issue is whether or not under order 4 there is some difference of treatment between you and the other people.

MR. WINTON: I agree. The point I was making is that under clause (b), which deals with an extended base plan, it says that when a plant shifts from one order to the other -- if your Honor will look at clause (f).

MR. HARRIS: He is talking about the statute now. He means clause (f) on pg. 8.

MR. WINTON: If your Honor will look at page 8 of that pamphlet on the statute.

(Pause.)

MR. HARRIS: Mr. Winton is referring to authorization for class 1 base plan.

MR. WINTON: On page 8 in the middle of the page, you see a (f) in parenthesis. "Order" is the first word. And (f), a further adjustment equitable to a portion of the total value of milk purchased by all handlers among producers on the basis of their

marketings of milk which may be adjusted to reflect the utilization of producer milk by all handlers in any use classification or classifications during a representative period of one to three years -- I'm skipping -- you will see it says provisions shall be made in the order for the allocation of bases under this (4), that is the end of the paragraph.

And if you turn the page to page 9iii, you will see it says Dairy Farmers not delivering as producers under the order upon becoming producers under the order by reason of the plant to which they are making deliveries, becoming a pool plant under the order by amendment or otherwise shall be provided with bases with respect to milk delivered under the order based on their past deliveries of milk on the same basis as other producers under the order.

We have not yet argued the point of law but we are addressing the factual record to that, your Honor.

MR. COPELAND: If your Honor please --

MR. WINTON: We are not yet arguing the law as to why we think this applies. We have argued it in our brief. At this point I am merely

trying to make a factual record that we have shown thusfar that as far as Honesdale's plant it came squarely within this, because it was an order 2 plant that became an order 4 plant.

Now we are trying to show that a bulk tank unit is just a plant on wheels and it comes under this section economically.

We may be wrong on the law, but that is our contention.

MR. HARRIS: The statute is referring to becoming under the order, in this case would be order 4. It has nothing to do with order 2. That is what the statute says in general terms. But when applied to this case we are talking about dairy farmers who become producers under order 4 because a plant becomes a plant under order 4.

THE COURT: I think my ruling is going to stand. I believe that the only issue in this case is an issue of discrimination among order 4 producers and handlers and plants. I don't really see any other way. As a matter of fact, I think that the Government is contending that the thing that you apparently are contending, that you are seeking favorable treatment as an order 2 producer coming into order 4,

to the detriment of the other people there. It would appear to me that if I am correct in that, that this is what the Government's contention is.

All you are doing, it seems to me, is attempting to prove that. At any rate, I sustain the objection.

MR. WINTON: We briefed the point, your Honor. I think there is enough in the record anyway. All we are saying it is discriminatory not to give us this base if we had been delivering to an order 2 plant which became an order 4 plant, or to an order 2 bulk tank unit.

THE COURT: But I don't agree with that. I think all you can contend is that you are being discriminated against as related to other order 4 plants or products or handlers. At this point I don't know which is the appropriate term, but I will use all three of them at the present time. You will enlighten me as to which is correct.

MR. WINTON: If your Honor please, when we brief this finally we will try to persuade you.

THE COURT: All right.

MR. WINTON: Your Honor, this is addressed to a different contention. It may be necessary to

point out what it is if an objection is made. Would you like a statement to what we are addressing ourselves to here?

THE COURT: No, I'd like to have it identified and bring out what it is and Mr. Harris and Mr. Copeland can object to it and I will rule on it. If they want to. They may not.

MR. WINTON: I ask that this be marked for identification.

(Plaintiff's Exhibit 15 marked for identification.)

xxxxx

Q Would you describe what this exhibit shows?

A This exhibit shows the receipts of milk at the Honesdale plant from Dairylea producer members from August through December, 1972. The volume of that production which was delivered to the order 4 market during each one of those months and the per cent of the volume of milk received at that plant, which was delivered to order 4 plants.

Q Is this prepared from the records of Dairylea?

A Yes, from our administrator's report.

Q Is it accurate?

A Yes.

MR. WINTON: I offer it in evidence.

MR. HARRIS: No objection, your Honor, other than our continuing objection.

THE COURT: All right.

(Plaintiff's Exhibit 15 was received in evidence.)

xxxx

Q Is it the practice of the milk industry to regard milk as fungible?

A Yes, it is.

Q Based on your knowledge as an expert in marketing orders and particularly order 4 and order 2, does the market administrator under each of those orders treat milk as fungible?

A Yes, he does.

Q When it comes to classifying it does he permit you to show the specific farmers' milk which went into a utilization or does he combine all the utilizations during the month and assign them to the milk as a whole fungibly?

A He assigns it on the whole.

Q Since August has Honesdale been regularly shipping milk of the producer members in this case to the order 4 market?

A Yes, there has been milk going into the

order 4 market from Honesdale.

Q It was at least 10 per cent in each of the months and more in some of the months?

A Yes.

MR. HARRIS: Objection. He's again leading the witness, your Honor "In other words" --

MR. WINTON: That is in the schedule.

MR. HARRIS: Then there shouldn't be any point in asking.

MR. WINTON: I could say these things directly to the Court to explain the case.

MR. HARRIS: To move things along we could skip this whole thing, since it is in the brief.

THE COURT: I think I suggested to you before lunch hour that it would save a lot of time, obviously, if you would not lead the witness. I think the objection is well taken.

MR. WINTON: I have been trying, your Honor. I just momentarily forgot myself.

THE COURT: You haven't been succeeding, so you'd better try a little harder.

Q May I direct your attention to clause -- I guess it's sub-section D on page 10, if your Honor please, of that pamphlet, 608C5D.

THE COURT: What page?

MR. WINTON: Page 10. And it is right near the beginning of the page.

THE COURT: This is the pamphlet of the Act, is that correct?

MR. WINTON: Yes. I ask the defendants whether they will concede that this order does not contain a provision authorized by D limiting producers to that.

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MR. HARRIS: When you say this order, you refer to order 4, I assume.

MR. WINTON: Yes.

MR. HARRIS: My understanding is we do not have a provision such as is allowed or authorized by sub-section D of that act, your Honor. In other words, order 4 does not contain a provision like that described in 608C sub D.

THE COURT: That is stipulated.

MR. HARRIS: Right.

MR. WINTON: In the brief, if your Honor please, the point is made that it could have contained such an order. I would like to offer evidence on it, but it is sort of hypothetical, as it doesn't contain such a provision.

MR. COPELAND: That would be very objectionable.

THE COURT: I do not think I understand.

MR. WINTON: What they said in the brief was they could have hit us harder than they did under the seasonal adjustment plan, so it is all right to hit us under the seasonal adjustment plan.

THE COURT: How are you going to show that?

MR. WINTON: I offered to prove through this witness that in this milk shed of the northeast, which is a fluid market, and the producers are all fluid milk producers, the secretary would not be authorized to limit any newly entering producers under this section as there could not be a proper factual showing that historically this section was adopted to deal with a different situation.

THE COURT: How were you going to do that with a witness? That is argument, isn't it?

MR. WINTON: I think there is something to be said for it, except that part of it is factual, that is that in this milk shed there are no manufacturing milk producers anymore, whereas when the act was adopted there were manufacturing producers. So when a manufacturing producer shifted into the order for the first time he wasn't particularly penalized by getting the manufacturing price for two months. But as thing have changed where there are no manufacturing producers the argument that is made, that they could have imposed a manufacturing price on these fluid producers, has no factual basis.

All we want to show is the factual lack of basis for invoking D, which --

THE COURT: I don't know how you were going to do that, Mr. Winton, but I won't rule specifically on it until I hear some questions.

MR. WINTON: I will try to make it very short.

Q In the northeast production area for milk are there any manufacturing producers left.

MR. HARRIS: Objection, your Honor. Can we define what the northeast means, now? Are we talking about one particular order?

THE COURT: Objection sustained.

Q Are you familiar with the production area which order 2 and order 4 draw from?

A Yes.

Q And you are familiar with the overlapping of the two?

A Yes.

Q In that area both the overlapping area and the general areas where order 2 and order 4 draw from, are there any substantial number of manufacturing producers left?

MR. COPELAND: I am going to object, your Honor, for this reason: This question said are you familiar with the overlapping of these orders and

there's been no evidence in this record to establish that they do in fact overlap.

MR. WINTON: That isn't true, if your Honor please. In the decision you have the secretary has found that they draw from an overlapping common milk shed.

MR. COPELAND: That may be.

MR. HARRIS: I have further objection, your Honor, and that is he is using terms like "substantial" and I don't know what that means.

THE COURT: I don't either.

MR. HARRIS: The question is objectionable as to form.

THE COURT: I sustain that.

MR. WINTON: As to form, your Honor?

THE COURT: As to form. Who knows what "substantial" means? I don't know what it means. I don't think Mr. O'Brien is -- at least I am not accepting him as an expert on the interpretation of "substantial".

MR. WINTON: I agree with you, your Honor. I will try again.

Q Mr. O'Brien, as a dairy expert familiar with the milk shed where order 2 and order 4

production area is, let me ask you, what in your opinion is the number or percentage of producers there who produce milk exclusively for milk purposes as against producers who produce milk of grade A for fluid purposes?

A I don't know of any manufacturing grade milk producers in the area.

Q To your knowledge, then, would any producer in this area be fluid milk producer?

A To the best of my knowledge, they are.

MR. WINTON: If your Honor please, in the decision of the secretary of May, 1970 and in the record there is undisputed evidence as to the intermingling of producers at the time of the hearing, which is in 1969, between the production area for order 2 and the production area for order 4. I have had Mr. O'Brien bring those figures up to date and I would like to offer a schedule.

MR. COPELAND: Your Honor, we are again talking about order 2. I thought your Honor has already ruled that order 2 is not relevant.

MR. WINTON: I am addressing myself now to our contention that order 4's producers adopted this seasonal plan as an excuse to hang certain

restrictive practices on it to keep out the other producers who are in the same common production area. I am now addressing myself to the discrimination by theoretically adopting a seasonal adjustment plan which is not a seasonal adjustment plan and on the basis of that, hanging off restrictive provisions intended to keep other producers in the common production area --

MR. HARRIS: We object. Your Honor, we have written a brief on this point which we would like to hand up. It is three pages. Say that this type of testimony is utterly irrelevant. The Supreme Court has ruled that it's not to be considered by Court's in determining this.

THE COURT: All right.

Mr. Harris, I don't know how you can prove by this man the intention of producers in order 4, in any event.

MR. WINTON: All we had in mind, if your Honor please, is to say the secretary found that these two orders draw from an overlapping production area and he has also found in other provisions that there is no basis generally, and it's disruptive and disorderly marketing for producers who are

situated next to each other to be getting different prices depending on the market to which they deliver.

THE COURT: I will tell you now, quite frankly, I felt and indicated to you before, I thought that that was the point which you are making. But it seems to me that that would be the argument I have indicated to you before that the Government would make, that there was a need for this -- I'm reasonably sure they are going to make -- there is a need for the separation in order to give some protection to purchasers in the area under order 4, which is the reason that the secretary made the differential.

If your purpose is to show that as an order 2 producer or handler or whatever is the appropriate term, that you want now the advantage of order 2 in an order 4 market, it appears to me what you are really calling for is a disruption of the scheme.

As I said earlier, I would think that is the argument that the Government would make, not you.

Let me put it to you, Mr. Winton, that is how I see that argument that you are making. And

maybe you can explain it some other way, but that is how my mind goes. Every time that you seek to introduce evidence as an order 2 producer, that you want the same advantages in the order 4 market it appears to me that is what the argument is.

MR. WINTON: We don't want to be able to go back and forth, if your Honor please. But the secretary in his original decision promulgated order 4, and I call your attention to that.

This was the original decision promulgating order 4.

(Handing.)

MR. COPELAND: Is that the decision dated May 22, 1970?

MR. WINTON: April 7, 1967. I call your Honor's attention to the page, it's number 5879.

The part I am interested in is the part which has been marked off there on the right hand column.

THE COURT: "It is of course true --"

MR. WINTON: Yes. Where he says "it was of course true that to the extent that the

Delaware Valley blend price is higher than the blend prices in adjacent market there will be an incentive for a plan to becoma pooled under this order. Since much of the supply area overlaps those of adjacent federal order markets it is obvious that dairy farmers do have alternative outlets.

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"It must be expected, therefore, that producers or plants will shift from one market to another in response to blend price differences.

"However, the order provides specific performance standards and only plants meeting such performance standards may pool. Plants so performing are an integral part of the marketing system and have every right to participate fully in the pool."

Our point is that if an order 2 producer located in the same supply area wants to shift into order 4 and do exactly what order 4 producers do, he shouldn't be inhibited by artificial discrimination. The secretary says it is perfectly natural for a producer to go into the highest price --

THE COURT: he cannot be discriminated as long as there is a rationale, in order 4, as long as there is a rational basis for the secretary to make a differentiation between order 2 producers and plants, and order 4 producers and plants.

Therefore, when he goes into a plant that is covered by order 4, in my judgment the issue is whether he is going to be discriminated against.

2 MR. WINTON: That is the issue.

3 THE COURT: He cannot bring his order
4 2 advantages into order 4, and therefore expect
5 to rely on them.

6 I have heard enough on that. Move on.

7 Q Let me ask you, Mr. O'Brien, as a
8 dairy expert as a matter of economics is it any
9 part of a seasonal adjustment plan to try to tailor
10 production of milk so that it fits the class 1
11 requirements of the market?

12 A No, that would be the class 1 base plan
13 which would attempt to do something like that.
14 Not the seasonal incentive plan.

15 Q As an economic matter is it any part of
16 a plan designed to level seasonal production to
17 attempt to restrict production.

18 THE COURT: Read that question back,
19 please.

20 (Last question read.)

21 MR. COPELAND: I don't know if I understand
22 the question.

23 MR. HARRIS: We have been alternating
24 between hypotheticals and actual questions. Are
25 you talking about the order 4 plan now or just

any plan that could be dreamed up?

MR. WINTON: Any plan. The economics of a seasonal adjustment plan as against the economics of a plan designed to level production.

THE COURT: This question relates to a seasonal production plan.

A A seasonal production plan is just designed to level production, not limit it in any way.

MR. WINTON: I would ask counsel for the defendant to stipulate that this was a publication distributed by Penmarva in April of 1970.

MR. COPELAND: I understand that while this does not carry at the caption Penmarva's base plan that this particular document was distributed only by Interstate Milk Producers Coopsrative, which is a member of Penmarva, but not by Penmarva in general.

MR. HARRIS: We will have to go with what hs says. It's his publication, your Honor.

THE COURT: With that explanation, are you identifying the document?

MR. COPELAND: Yes, sir. We have no objection.

MR. WINTON: I offer it in evidence.

MR. HARRIS: We object to that.

THE COURT: Mr. Harris, do you change your mind?

MR. HARRIS: No, I thought he was just identifying it. I think we both misunderstood. I thought he was offering it for identification. We object to putting it in evidence because we believe it is irrelevant.

THE COURT: Let us mark it in any event so we know what we are talking about.

MR. WINTON: It's at least an admission against interest as against Penmarva's constituent.

THE COURT: Why are you offering it?

MR. WINTON: There are two statements that are particularly relevant. Towards the end, the fourth paragraph from the bottom, it says this plan, and it is referring to the plan here, was proposed to meet the challenge of the falling class 1 utilization in the region. A significant part of a declining class 1 percentage has been caused by the transfers of unneeded milk into the middle atlantic regional orders from the New York market; and then look at the bottom, it says, the last

two sentences, "If the plan does not receive a two-thirds favorable vote of those voting we will have a wide-open marketwide poll. Be sure to vote, and we recommend a favorable vote."

MR. COPELAND: Your Honor, Mr. Winton is doing indirectly what we were objecting to him doing directly. I think the record should also reflect that we made that available to Mr. Winton. He asked us to make certain material available and we did that without subpoena. I think that should be explained to the Court, too.

MR. WINTON: It was produced at the deposition, but we had copies.

MR. HARRIS: The reason for ~~getting~~ putting this in is perfectly obvious. It's an attempt to show that Interstate or Penmarva, or whoever had some kind of motive for supporting the plan, and we think the Supreme Court has dealt with that very clearly in the brief and said that it is irrelevant to such a proceeding.

THE COURT: I agree with Mr. Harris. If you are discriminated against and your contention is you should not be, what difference does it make that they intended to do so? It doesn't seem to

me that it strengthens your case at all.

MR. WINTON: You may be right.

THE COURT: The point you have to show is that you have been discriminated against.

MR. WINTON: All we are showing is it was intentional. That was the plan.

THE COURT: Mr. Winton, obviously these orders, it seems to me, are made to keep certain milk out and to protect certain kinds of farmers in certain areas. The fact that New York and New Jersey, as opposed to Pennsylvania or whatever, it seems to me reasonably clear. The fact it is for that purpose, for protection, does not, it seems to me, make the order invalid.

It is perfectly legitimate to have certain kinds of discrimination among various kinds of persons in order to protect the industry as a whole. I don't think you prove anything by that.

MR. WINTON: I won't press it. I just wanted to show the motivation.

THE COURT: As I keep trying to indicate to you, the only thing that you are going to at least be able to persuade me that you have a case here, you are going to have to show me that there is

discrimination as between you and other order 4 producers and plants. That is how I see the issue. And the fact that these other things seem to me just confusing.

MR. WINTON: Perhaps your Honor is right. We thought we had shown the discrimination and we thought -- what we were trying to show is that it was deliberate. It was like trying to say it's untrue and you know it. Just underscoring the discrimination.

THE COURT: I am going to sustain the objection.

MR. WINTON: That completes our case, if your Honor please.

THE COURT: Does that complete the examination of Mr. O'Brien?

MR. WINTON: As far as I am concerned.

THE COURT: Don't rest yet. You may want to ask Mr. O'Brien some questions on rehabilitation. Don't do it so early.

MR. WINTON: Your Honor is correct. I had indicated to the Government that we were not going to call any other witnesses.

THE COURT: Suppose we recess for the

reporter's fingers now for about 10 minutes.

(Recess.)

CROSS EXAMINATION

BY MR. HARRIS:

Q Mr. O'Brien, I believe you indicated you have been employed by Dairylea since 1949?

A Yes, I have.

Q Has that been continuously?

A Yes, it has.

Q And you described some of your duties when you testified. Do some of your duties in your capacity as an economist for Dairylea include testifying in administrative hearings?

A Yes, it does.

Q How about testifying in Court?

A This is my first time.

Q What about at Congressional hearings?

A I don't think I have ever testified in a Congressional hearing.

Q Have you had any connection with a Congressional hearing, preparation of somebody else's testimony?

A Yes, I believe I have.

Q Was this in connection as an employee

of Dairylea?

A Yes.

Q About how many times would you say you testified in administrative hearings?

A I'd have to say probably a hundred times.

Q Were these on behalf of Dairylea?

A Yes. As well as on behalf of other organizations who we had a joint interest with.

Q You indicated that you were familiar with the provisions of orders 2 and 4 that we have talked about in this case, did you not?

A Yes.

Q Are you generally familiar with the procedures by which orders are promulgated?

A Yes.

Q In fact, you personally participated in some of the procedures that led to the promulgation of order number 4 that is in issue in this case, did you not?

A Yes.

Q In what way did you personally participate?

A As a witness. We had a proposal for inclusion in the market order.

Q When you say as a witness, was that at a hearing?

A At a hearing, yes.

Q Was this a hearing held to determine what kind of marketing order should be issued for order number 4?

A What kind of order and what the terms and provisions would be.

Q And you testified on behalf of Dairylea, isn't that correct?

A Yes, I did.

Q Did anyone else testify on behalf of Dairylea?

A I don't recall whether there was any other witness on behalf of Dairylea or not.

Q Did Dairylea submit briefs, do you know?

A Yes.

Q And other papers?

A Briefs and exceptions to the recommended decision.

Q Did you have a proposal that you submitted?

A Yes, we did.

Q I gather that was not the one that was

accepted in the final order, isn't that right?

A Yes. We proposed a base excess plan -- excuse me, a Louisville-type seasonal incentive plan, instead of the base excess plan which was adopted.

Q Referring to Johanna Farms, does Dairylea have any financial interest in Johanna Farms?

A No. Only as a customer.

Q Doesn't own any stock?

A No.

Q Has it ever loaned any money to Johanna Farms?

A Not that I know of.

Q Do you know what kind of contract Dairylea has with Johanna Farms?

A Only in a general way.

Q Is it called a requirements contract?

A I wouldn't know that.

MR. HARRIS: Mr. Winton, would you stipulate that it is a requirements contract?

MR. WINTON: It's an agreement to supply the requirements, with certain exceptions.

MR. HARRIS: I will accept that.

Q How long has Dairylea, if you know, had a contract with Johanna Farms?

A I know it's been several years. I'm not sure how long it is, entirely.

Q But it predates May of '72, in any event?

A Yes.

Q Prior to May of '72 where did Dairylea get the milk which it supplied to Johanna Farms?

A We have producers already under Order 4 who deliver to Johanna Farms and we supplied Johanna with milk from two other supply plants to Johanna Farms. One in Beaver Springs, Pennsylvania, and one at Newfoundland, Pennsylvania. And we ship in additional supplies from order 2 supply plants to the order 4 distributing plant at Johanna.

Q Were any of these sources of supply plants or producers or handlers, or whatever, that were independent of Dairylea? In other words, did Dairylea purchase milk from some independent source and then ship it to Johanna Farms?

A We may have, I don't know.

Q Who made the decision, this is back prior

to May of '72, of which milk was shipped to Johanna Farms by Dairylea?

A It's usually a recommendation from our marketing people to the board of directors, and as far as pooling under the order, this was done at the direction by the board. But as far as which supply plants would actually deliver this day to day or month to month basis, that would be determined by the marketing people.

Q When you say the marketing people, where are they located?

A In New York City.

Q In the Dairylea offices?

A Yes.

Q In other words, it's not up to the individual farmer, whoever he may be, in Flemmington, New Jersey, or some part of New York State; he doesn't make the decision, does he?

A Not as an individual, but overall the farmers do direct the activities of the association.

Q As a group?

A As a group, yes.

Q May, June and October, as I understand it,

Dairylea shifted some milk which had been produced by people producing milk in order 2 over to order 4 in order to supply Johanna Farms; is that right?

A Yes.

Q Was this the milk from the Honesdale Plant and the Salem bulk tank?

A Well, the producers who went in in May and June were a part of the Salem bulk tank unit.

Q What about in October?

A The rest of the Salem bulk tank unit went in on October 1, as well as the plant in Honesdale, Pennsylvania.

Q Prior to that time do you know where these people's milk was being shipped?

A The Salem producers' milk was delivered to several handlers in the New Jersey portion of order 2. That would be northern New Jersey. And the Honesdale milk, some of it went to Johanna, a small quantity -- a small portion of it. And I believe most of it went into a Dairylea bottling plant in Woodside in Queens.

THE COURT: Is that under order 2?

THE WITNESS: Yes.

THE COURT: I gather that the producers in the past, those two places, that originally supplied Johanna Farms but were order 2 are not included as complaintants in this action; they are not the people whom you allege are being discriminated against.

THE WITNESS: That's correct, if your Honor please.

Q Was the decision to the shifting of this milk in May, June and October, '72, made in the same way as the decisions as to how milk was supplied, that you previously described existed prior to May? In other words, by the persons located in New York, the marketing people, I think you called them.

A No. In the case of where we shifted a plant from one market to another it's usually recommended to the board of directors or the executive committee of the association and they act upon the recommendation.

Q Do you have any role to play in that process?

A Only as an indirect advisor to these people.

Q In general terms you were describing to the Judge earlier how if you had the historical base in order 4, in other words, the old producers, you got what you said was approximately 90%, and the new producers only received what you called an arbitrary 60 or 70%, depending on which month; is that right?

A Yes.

Q Speaking about the individual producers whose milk was shipped which ended up at the Johanna Farms plant in May, June, October and November of '72, what price did these individual producers actually receive for their milk?

MR. WINTON: I object, if your Honor please. In the exhibit and stipulation you will see that as required by law, in exhibit which is marked Schedule 1, which has been stipulated as the form of contract Dairylea has with the producer members, paragraph 2 says the products of all sales made by Dairylea shall be blended into one general fund and Dairylea shall pay over such funds to the producer and to other producers so that the price received by the producer shall be uniform with that paid other producers subject

to such differentials as Dairylea may from time to time determine to be equitable and may establish and subject to such other deductions or adjustments as may be authorized in the by-laws.

20/ THE COURT: By reading that the objection is overruled because I would like to understand that. I gather this is precisely what the question is addressed to. I don't understand it.

MR. WINTON: I was going to say that under the law an order to a producer organization does not require it to pay the minimum price. It collects the minimum price and it settles in accordance with its contract.

MR. HARRIS: I haven't asked that.

THE COURT: Overruled. As a matter of fact, I think the question now will illuminate this for me. You may continue, Mr. Harris. There is a question pending. I suppose you'd better read it back.

MR. HARRIS: It may be easier for me to rephrase it.

Q Isn't it a fact that the actual producers whose milk ended up at Johanna Farms for those months that we have been concerned with, that the

price they received was based on the order 2 price with certain adjustments?

A Yes. The board of directors has determined that rather than create a disorderly situation among our members, that they would continue to have their price based upon the order 2 price but having the same adjustments taken off of their price that all other members of Dairylea have.

Q Let me ask you this: When the producers' product is picked up either by a bulk tank unit or whatever, so that it gets into the processing system and ends up as either class 1 or class 2 milk, do the producers have any control over which class of milk or what happens to their milk, or how it is allocated?

A No. That is prescribed by the market order.

Q Let me show you plaintiff's Exhibit 12 in evidence. Looking down at the caption "Utilization of Johanna direct delivery receipts, 1972," do you see that?

A Yes.

Q You have four months: August, September,

October, November. There is a jump between the producer receipts in August and September and the amount in October and November, which in my rough mathematics is about three million pounds; isn't that right?

A That's right.

Q Does this difference, three million pounds, represent the increase in Johanna's business in that period?

A No.

Q What does it represent?

A It represents the additional volume of milk that was delivered from order 4 producers to Johanna, because on October 1 as we added the Salem bulk tank unit to the Johanna supply, on that day they become order 4 producers and therefor their producer receipts increased by that amount.

Q Mr. O'Brien, how does the milk get from the producers' farms to the Honesdale plant?

A The milk is picked up at the farms by a pick-up truck and hauled to the Honesdale plant.

Q Are these sometimes referred to as tank trucks?

A Tank pick-up trucks, yes.

Q Is it true to say that the milk goes from the Honeedale plant to the Johanna plant in a large tank truck?

A Yes.

Q Who owns these tank trucks, both the first set of tank trucks we referred to and the large tank truck?

A A contract hauler in most cases. We do have some trucks of our own, but I believe these are mostly contract haulers.

Q When you say contract haulers, you mean under contract to Dairylea?

A Yes.

Q With respect to the Salem bulk tank unit does the milk go from the Salem bulk tank unit to the Johanna Farms plant by tank truck also?

A By the tank pick-up truck.

Q Is that owned by a contract hauler?

A Yes.

Q Are they under contract with Dairylea?

A Yes.

Q Do you have a copy of order 4 in front of you, Mr. O'Brien?

A Yes.

Q Turning your attention to page 4 of the booklet, section 1004.9, which is entitled Handler, and looking down at sub-section C towards the bottom of the right-hand column on that page, and referring to the language "Unless both the cooperative association and the operator of the pool plant notify the market administrator in writing prior to the first day of the month that the plant operator will be responsible for payment of the milk and is purchasing the milk," and so forth, and so on, has any such written notification been made as far as you know to the market administrator by Dairylea with respect to the Salem bulk tank unit or the Honesdale milk, as it is shipped to Johanna Farms?

A I don't know whether there was or not.

Q Do you know whether Johanna Farms has made any such written notification to the market administrator?

A No, I don't. I might add that Johanna has been the reporting handler and direct delivery receipts at that plant for a long period of time.

Q Are you familiar with the concept

supply management?

A Concept of supply management, yes.

Q What does that mean?

A As generally treated in the industry it's a type of program which could be various programs, which would tend to reduce the production by individual farms, thereby eliminating surplus milk which may have to be purchased by the Government under the Price Support Program, and by having such a program the idea would be to increase the returns to a dairy farmer on the milk that he would market.

Q In your view is a class 1 base plan an example of a supply management program?

A It has elements of a supply management program because for the producers to increase their history of bases, they would do so at penalty.

Q What about a 12-month base excess plan, such as we have in order 4?

A I think it has elements of the same thing in it.

Q What about the four-month base plan that you used to have in order 4? Is that a supply management program?

A No, that is a seasonal incentive program.

Q Suppose you had a six-month pay-out period, what would that be?

A That wouldn't change it very much, just by changing it two months. You would still have a substantial period of time, and I would assume that under a six-month pay-out program that you would have six months as a base forming period, so at that time the producer would not have the penalty by increasing his production.

Q Is it your concept that there should be an equality between the period, the number of months in which you get a base and the number of months in which you get credit for that base? Is that the concept that would be other than a supply management program?

A It doesn't have to be equal in length, no.

Q Right now in order 4 how many months do we have to establish a base?

A You have five months to establish a base and it's during the months of August to December. And then the base is applied during the following March through February period.

Q Which is a 12-month period?

A Following a gap of two months where the bases are calculated, but based upon the five months prior to that.

Q That is what you would refer to as a 12-month pay-out period?

A Yes.

Q If you kept the same five-month period in the fall as the base period that you have now, the only difference was instead of having a 12-month pay-out period you had a six-month pay-out period--

MR. WINTON: Which month?

MR. HARRIS: Just let me finish the question.

Q Would that be in your view a supply management program?

MR. WINTON: I object to the form of the question, in that it doesn't specify which six months the pay-out would be.

MR. HARRIS: I am not sure that the witness said which months are critical.

THE COURT: Overruled. Let him answer.

A If the producer is able to form a base

and never have a penalty on his production, then it would be a seasonal plan. But when a producer is given an arbitrary assignment of base or receiving something less than the fall price, then it would have elements of a supply management program in it.

MR. HARRIS: Move to strike that. I don't think it is responsive. Maybe it's my fault, but as I understand the witness has said that the present plan which has a five-month period in the fall in which you qualify to get a base, and then has a gap of two months, and then a 12-month pay-out period, this is a supply management program. What I am saying is, assuming the identical plan as we have in order 4, and the only difference is you shorten the 12-month pay-out period to six months, does it remain a supply management program, and it seems to me that the answer I got was not responsive to the question.

21/

THE COURT: Would you answer the question?

MR. WINTON: I thought he had. Would you have it read back?

THE COURT: It seems to me the answer could have been much shorter than I heard.

(Record read.)

THE COURT: Mr. O'Brien, you may be answering the question, but I don't think it is clear. Are you saying yes or no to the question Mr. Harris put to you in regard to the answer you gave? I don't know whether the answer is yes or whether you said it is no.

MR. HARRIS: I just want a yes or no answer.

A This would have elements of supply management in it, because you would have at least one month in there in which there would be a penalty involved.

Q What if the pay-out period was then reduced to five months?

A Five months, this could be March through July as a base operable period and this would not then have elements of supply management in it.

But when you get into August, which again is a base forming period, then you would have elements of supply management in it.

Q Did you hold these opinions that you have now expressed about supply management programs prior to May, 1970?

A (No response.)

Q I don't mean to pick May as a point to remember. Prior to, say, in 1970.

A Yes, I think I did.

Q Did you testify about this at the hearings at the promulgation of the order which led to the present order 4.

MR. WINTON: I object, unless there is going to be an attempt to contradict the witness. If it is, he should be shown the testimony, not asked generally whether he remembers that he testified, and it might be or is contradicted.

If you want to impeach the witness you have to show him the testimony and ask him whether he testified.

MR. HARRIS: I have got to ask whether he testified.

THE COURT: All right.

2 A I testified at the hearing in support
3 of a Louisville plan, rather than a base excess
4 plan in support of this market.
5 THE COURT: Was that at the hearing that
6 led to the promulgation of order 4?
7 THE WITNESS:- Yes.
8 Q When you testified at that hearing that
9 you just referred to did you go into the concept
10 of supply management programs?
11 A No.
12 Q Mr. O'Brien, do you have Plaintiff's
13 Exhibit 6?
14 A Yes.
15 Q Looking down at the figure opposite
16 the column which is labeled number 26, as I
17 understand this, that for the month of October
18 the Dairylea Cooperative owed the producers
19 settlement from the sum of $92,625.72; is that
20 right?
21 A Yes.
22 Q If in fact the Dairylea producers had
23 received the historical base which they claim
24 they were entitled to in this lawsuit during the
25 period of time of this report, what would have

happened to the figure of $92,625.72?

A That figure would have been reduced because as you make the calculation up above, our payments into the pool would have remained the same, but on the credits, of payments due to Dairylea out of the pool, would have been larger; and therefore this figure would have been smaller.

Q How much would it have been smaller by, do you know?

A I think we made the calculation as an exhibit.

Q Would it be smaller by the amount of what you would claim was losses on your exhibit when you had the Honesdale losses?

MR. HARRIS: I am trying to save time, your Honor, without going over all those records.

A I think it would be thirty-three or thirty-five thousand dollars, yes.

Q In other words, you would have owed less money to the market administrator; is that correct?

A No. He would have paid back more to us, in effect.

MR. WINTON: If your Honor please, at

this point they are confusing the two capacities of a cooperative. The cooperative is required as somebody who sells --

THE COURT: No, Mr. Winton.

MR. WINTON: I want to explain it to you.

THE COURT: No, I don't want any testimony. There's been enough testimony by you, Mr. Winton, anyway. If it isn't clear, then you can bring it out by questioning.

Q Mr. O'Brien, would your testimony be the same with respect to Plaintiff's Exhibit 8, the figure in column 26? In other words, would the figure shown there that was owed to the market administrator be reduced if Dairylea producers had received their historical bases as they claim in this lawsuit?

A Yes. The net difference between what we owed the administrator and what the administrator owed us would have been reduced.

Q The figures you have referred to during the course of your direct testimony as the arbitrary 60% base and the arbitrary 70% base -- I think you used the term arbitrary, you may have used others -- those are the bases

that are promulgated in the order, isn't that right? When I say order, I mean order 4. In other words, aren't you referring to the figures that appear in section 1004.92?

A Sub-section (2), yes.

Q You have already testified about some overlapping areas between order 2 and order 4; isn't that right?

A I'm not sure that I was allowed to, but there is an overlapping supply area for those areas.

Q There are places geographically where there are some farms whose milk -- never mind whether they are Dairylea producers or other producers -- whose milk goes to order 4, people who in the same geographical area have some milk that goes to order 2; are there areas like that?

A Yes, there are. Several.

Q Isn't it a fact, therefore, that producers in these overlapping areas whose milk may be going to different markets may be receiving different prices?

A It is a fact, yes.

THE COURT: Let me be sure I understand

that, Mr. O'Brien and Mr. Harris. The answer to the question, does the answer to that question mean that farmer A, let us say in, say, any town in New Jersey, and assuming it is an overlapped area, that farmer A may be supplying milk in Pennsylvania and therefore will be under order 4, and farmer B may be supplying milk to New York and be under order 2; is that what the answer to that question means?

THE WITNESS: It means that there may be dairy farmers living side by side, one of whose milk may be going to a plant that is regulated by order 4 and the other producer may be delivering to a plant which is regulated by order 2, and they receive different prices for their milk.

THE COURT: It doesn't mean that the milk will be consumed in that area and therefore there are differences.

THE WITNESS: That is correct. It does not mean that it will be consumed in that area, because order 4 milk is distributed in the order 2 marketing area in some instances, and there is order 2 milk distributed in the order 4 marketing

area.

MR. HARRIS: No further questions.

CROSS-EXAMINATION

BY MR. COPELAND:

Q Mr. O'Brien, would you agree that under the provisions of section 1004.9 of order 4 that Dairylea would be the handler with respect to the Salem bulk tank milk if Dairylea did not notify the market administrator in accordance with that provision.

A That calls, I think, for a legal judgment which I can't do. The circumstances --

Q I won't press you, that's all right.

A Johanna has been reporting handler on our direct delivery of milk to that plant for several years, I would say, and the fact that they just added some additional producers to that plant shouldn't necessarily change what had gone on before.

Q Mr. O'Brien, with respect to the contested base excess provisions of order 4, did Dairylea ever file a petition for review with the Secretary of Agriculture under Section ~~608c(15)(A)~~ 608c(15)(A) of the Agricultural Marketing Act.

MR. WINTON: I concede we didn't.

MR. COPELAND: No further questions.

BY THE COURT:

Q Before I forget it, so I can understand this, Mr. O'Brien, am I to understand by virtue of an answer that you gave to Mr. Harris that even those these losses that you indicated have been sustained by virtue of the supply in order 4 that the actual farmer is being paid what he would receive if he were under order 2?

In other words, the actual farmer supplying the milk does not suffer any losses; is that correct? Is that what I understood your answer to be?

22- A Individually the farmer has not had any change in what he otherwise would have received. But collectively the Association adjusts its loss assessment over all members. So that to the extent that we would have lost these monies it would have affected the returns of not only these producers but all of the members, since we have a reblending type program.

Q And at some subsequent time you will have an adjustment and, therefore, the individual farmer

may feel some penalty by virtue of this program; is that what you are saying?

A This is possible.

MR. WINTON: First, I will address myself to the point your Honor raised. I ask that this paper be marked for identification.

xxxx (Plaintiff's Exhibit 17 marked for identification.)

REDIRECT EXAMINATION

BY MR. WINTON:

Q I show you Exhibit 17, the duplicate copy kept by the league of the checks which it pays out to producers?

A Yes. This is what you call a copy of our check register.

Q Is this one of the producers involved in this case?

A Yes. It's two producers, actually.

Q Would you explain to the Court what the column headed ADJ., and then the other one Co-Op --

A Co-Op expense charge.

Q -- means.

MR. WINTON: Do you see that, your Honor? It's in the column right here.

THE COURT: In pounds?

MR. WINTON: It is a price adjustment in hundredweight. And the other column is supposed to say Co-Op Expense Charge. It is not quite illegible, but that column next to price adjustment says Co-Op Expense Charge.

Q Will you explain to the Court what those fees are?

A First, the Co-Op Expense Charge is what we would call dues for the Association. The price adjustment is a necessary adjustment we as an Association have had to make in reducing the pay price to the members because of our income being less than our expenses. And this is an adjustment to reflect that.

Q In other words, this is a deduction?

A Yes.

Q The 10 cents represents a deduction, then, per hundredweight of milk; would you explain how that is related to the receipts and disbursements.

THE COURT: Is that 10 cents?

MR. WINTON: It is five and five, two deductions. Five cents called adjustment --

THE COURT: I didn't know whether it was 10 or 5, you added that to.

THE WITNESS: Yes.

Q In other words, the aggregate deduction is 10 cents; is that correct?

A Yes, it is.

Q How is that related to all the receipts and all the expenses of the Co-op?

A The price adjustment, we have the normal dues which has increased up to five cents within the last five years. And then, because our income from the sale of milk and marketing of milk has not equalled our overall expenses we have had to make adjustment further reducing the price by an additional five cents to a total of 10 cents, from what we start out with as a market price.

Q So if this additional money which is claimed by the plaintiff here were received, what effect would it have on the deductions?

A Well, it could result in this loss together with other losses resulting in increase from five to a higher figure or a bigger deduct.

THE COURT: These figures are based upon Dairylea's oparations overall, isn't it?

It is not limited to the operations involving order 4; is that correct?

THE WITNESS: That is correct.

THE COURT: So that even if an adjustment is made in order 4 there might be some other price which would be reflected here; isn't that right?

THE WITNESS: That's correct.

THE COURT: So you cannot relate this five and five merely to this issue that is before the Court, can you?

THE WITNESS: Not directly, your Honor.

THE COURT: All right.

MR. WINTON: If your Honor please, it's been stipulated that the plaintiff is a reblending co-op as permitted by the law. I am trying to point this out.

THE COURT: What has that got to do with this question?

MR. COPELAND: If your Honor please, I was just going to say that.

MR. WINTON: In paragraph 5 --

THE COURT: Let me read paragraph 5.

(Pause.)

THE COURT: I understand that, Mr. Winton. But as I understand Mr. O'Brien's testimony, you could actually, even if you received what you regard as an equitable price, there might be, for whatever rise in cost or something like that, there might be some losses and it would not necessarily mean that this 10 cents additional would be eliminated.

MR. WINTON: Oh, I agree, your Honor. It's an element in it, that's all. One element.

THE COURT: But we are not able to ascertain what that element is, are we?

MR. WINTON: I was going to go on and call your Honor's attention to the pamphlet, page 10, the pamphlet dealing with the law. Paragraph F. It's in the middle of the page. It says nothing contained in this sub-section--

MR. HARRIS: All that statute says is what they are doing is not illegal.

THE COURT: I think Mr. O'Brien has explained to me very clearly what is done.

MR. WINTON: I am trying to point out that Dairylea is a reblending cooperative under F.

THE COURT: I understand that. But that

doesn't change the issue. The issue that I am really trying to get in my mind, and I think it is clear, is to whether or not this cost to or the price that the individual farmer or producer receives is directly related, correlated to the losses in order 4, and the answer is no.

It may or may not. Because of the comingling of some kind.

MR. WINTON: That's right. But it's a protanto charge. No matter what it is, it is reflected as a deduction. In other words, if you get $300,000 less in the blend of Dairylea, then protanto you get that much less.

MR. HARRIS: I object to Mr. Winton testifying.

MR. WINTON: I am not testifying. If your Honor please, I was explaining what a reblending co-op is.

THE COURT: You are testifying. I thought I explained to you that I understood it. I am sorry I got us off on this track.

Q Mr. Harris called your attention to Exhibit 6, I think it was, which was the pool obligation and calculation.

A Yes.

Q What was that, the one for October.

A Honesdale for October.

Q Would you refer to the line, it is credits, 15 and 16.

A Yes.

Q Will you explain how in the case of a cooperative that is handled as against how that is handled in the case of a proprietary handler.

MR. COPELAND: Your Honor, may I ask what the relevance of this particular evidence is? I don't understand its relevance.

MR. WINTON: I will be glad to state it, but then they will be saying I am testifying, if your Honor please.

THE COURT: I would like to know the relevance.

MR. WINTON: I will tell you. I am trying to bring out the difference between this credit in the case of a proprietary handler and in the case of a cooperative. What this credit is, and you can excuse the witness, if you don't want him to hear this, is part of the equalization program of blending. In other words, after you

compute the whole pool and you have got an average price, the way you average out in the pool is for a proprietary handler to pay that amount to his farmers and he gets a credit for it. That is what you have in the case of a proprietary handler because in that case the law and the orders say you must pay that blend price to the former. But in the case of a cooperative the law says the proprietary handler must pay that blend price to the association or producers, so it stands in the farmer's place.

It gets that credit because the association of producers is just treated like a producer. And if your Honor will look at the law, you will see that. This is the mechanism of blending market-wide pool.

THE COURT: But what is the relevance of that?

MR. WINTON: The relevance, in what right do you get that credit?

A proprietary handler gets it because he is required by law to pay it to farmers. Whereas a cooperative association gets it because the law says that the handler shall pay to the ~~proprietary~~ cooperative.

handler that amount. It's under sub-division 2 which says -- we are dealing now with the payment made to this cooperative in this case in the right of producers.

23/ THE COURT: All right. What you are indicating is that, I gather, even though there is a loss to the cooperative under this arrangement and therefore the cooperative is injured by the agreement --

MR. WINTON: Exactly.

THE COURT: But I understand that.

MR. WINTON: Let me explain it in a different sense. Suppose it was illegally taking half the money --

THE COURT: If you want to explain that further, I think the place of that is in the brief. I do not think I need any further explanation. I understand that.

MR. WINTON: I first offer this check in evidence, Exhibit 17.

MR. HARRIS: No objection.

(Plaintiff's Exhibit 17 was received in evidence.)

xxxx Q Mr. O'Brien, as an expert in the operation

of market pools, let me ask you this: Suppose an order had an illegal charge against the pool as a whole which reduced the base excess price, say, a charge such as was held illegal in the Zubrn case. There is a charge made against the pool as a whole, as a result of which the pool has been diminished, and it's an illegal charge. Let us assume it is an illegal charge of the type that has been held illegal by the Court, which has reduced the pool, the amount of money in the pool.

Applying such a situation to this form, what effect would the illegal deduction have? Would it be reflected in paragraphs 15, 16, or some other paragraph of this order?

MR. COPELAND: Objection, your Honor.

THE COURT: What are you referring to?

MR. WINTON: Exhibit 6.

MR. COPELAND: It's based upon assumptions which are not in the record. This question I think is clearly improper.

MR. WINTON: It is a hypothetical question addressed to an expert.

MR. COPELAND: If there is some provision

here which is illegal. There is nothing in the record to lay a foundation for such a question.

THE COURT: I think he is alleging that order 4 is illegal, isn't it? If that is the objection, I don't think much of the grounds on that, Mr. Copeland. At least if he isn't alleging that, this has been clearly a waste of time, this whole day.

MR. HARRIS: What I am concerned about is the last couple of words. I am not sure I got which numbers the witness was supposed to look at.

MR. WINTON: I directed his attention to these numbers and said which of these numbers would it be reflected in. I said 15, 16 or whatever it is.

MR. HARRIS: That is the way I thought you had. Then I object. I don't see what the relevance of that is.

THE COURT: I will allow it on the supposition that what Mr. Winton is trying to show is that there has been by order 4 some loss of profits or injury, financial injury to the cooperative. If that is what he is trying to show,

I will allow it, particularly since I brought up the question of injury to the individual producer. You can answer the question, if you can.

A Yes. If there were a charge it would reduce the credits on lines 15 and 16 in the exhibit.

Q Would that have the effect, then, just as a matter of mathematics in the equalization of the pool, what effect would that have on the pool obligation of the co-op?

A In the instance where most of this milk was used in class 1, this would have the effect of increasing the pool obligation.

Q Let me ask you, assume that the payments that were held illegal were something like 50% of the pool, so that the pool return was cut in half; would that have the effect of reducing items 15 and 16?

A Yes, substantially.

Q It would, therefore, increase the handlers' obligation, even though it were a co-op?

A Yes.

Q When a proprietary handler is given the credit under 15 and 16 what is he required by law to do with it? That is the credit for the uniform

base and excess price, if your Honor please.

THE COURT: Why do I have to have that in the record?

MR. WINTON: Because that is the difference between the co-op and the --

THE COURT: If it is in the law, you tell me in a brief. We don't need to have this witness tell us what the law is. If you are interpreting the law, you tell me that in a brief. I want factual testimony from Mr. O'Brien, not what the law requires. I assume it is either in order 4 or in the act.

Q Is this the method by which the equalization fund is cleared, referring to exhibit 6?

A Yes, it is.

Q If that price in the pool has been illegally reduced, then the credit to the co-op is affected, is it not?

A Yes.

MR. HARRIS: Objection.

THE COURT: The question has been answered before, anyway, Mr. Winton.

MR. WINTON: All right. I guess

I have gone as far as I can on this.

THE COURT: Just assume I can understand some things.

MR. WINTON: This is one of those complicated things, your Honor.

THE COURT: You are making it, I think you are making it more complicated than it needs to be.

MR. WINTON: The only thing left now --

THE COURT: Are you through with this witness?

MR. WINTON: The only thing I wanted to ask, your Honor is going to take this hearing record as an exhibit, are you not?

THE COURT: Nobody has offered it yet.

MR. WINTON: I just want to make it clear, then, that is the last part of our case after we excuse the witness.

THE COURT: Are you through with this witness?

MR. WINTON: Yes.

THE COURT: Thank you. Anything further?

MR. HARRIS: No further questions.

MR. COPELAND: No questions.

THE COURT: Thank you. You may step down.

(Witness excused.)

MR. WINTON: I have asked other counsel and we are willing to have this marked as a joint exhibit.

MR. HARRIS: Yes, sir.

THE COURT: Does the plaintiff rest?

MR. WINTON: Yes.

MISS DAVIS: Your Honor, I respectfully move to dismiss the action on the basis that the plaintiff has completely failed to establish a cause of action on which relief can be granted. It has shown no evidence whatsoever that any claim that may have affected plaintiffs' producers coming into the market was not a distinction that was recognized at the time that the order was considered; no discrimination, and there was great testimony given, facts, figures, statistics, even expert testimony of plaintiff's witnesses themselves, no evidence of any discrimination or any distinction made that was not supported by the substantial evidence of the record.

There's been testimony on an economic

term called supply management.

We have had no testimony as to what supply management has to do with any invalidity of the act. As a matter of fact, there's been no evidence, your Honor, that supply management had any -- even if it were true, had any effect on the market. There's been no evidence whatsoever that in the time since August of '70--

THE COURT: All right, Miss Davis. I think you make the objection for the record, rather the motion, and I will take that motion under advisement and decide that at the conclusion of the hearing.

MR. COPELAND: If your Honor please, may the record reflect that I join in the motion to dismiss.

THE COURT: Of course. All right, Mr. Harris. Is there any contemplation by anyone, if the Government goes forward, that we will be able to finish this?

MR. HARRIS: Your Honor, the Government expects to call one witness who it expects to be about five minutes and then we will rest.

MR. COPELAND: Your Honor, I expect to

call Dr. Paul Hand, who was here in the courtroom, and I don't expect his testimony to take too long.

THE COURT: All right. Let us hear the witnesses and we will see how far we can go.

MISS DAVIS: I call Mr. St. Clair.

A L E X A N D E R S T . C L A I R ,

called as a witness and having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MISS DAVIS:

Q Would you give us your occupation, please?

A I am the Federal Milk Market Administrator of order number 4 regulating the handling of the milk in the middle atlantic marketing area.

24 Q Could you tell us briefly what your responsibilities are?

A Carry out the terms and provisions of Federal order number 4.

Q Are you familiar with Johanna Farms, Mr. St. Clair?

A Yes, I am.

Q Did there come a time when you made a

determination as to who was the handler of the milk on Johanna Farms?

A Recently there has been.

Q Could you tell us what that determination was and what the basis of that determination was?

A That Dairylea was the handler inasmuch as they had never filed notification with our office to the effect that they would not be under the provisions of -- I can't come up with the section for the moment -- it was referred to here earlier.

Q I show you Plaintiff's Exhibit 9, Mr. St. Clair. Do you recognize that?

A Yes, I do.

Q Does the information on Plaintiff's Exhibit 9 reflect the answer that you have just given?

A No, it does not.

Q Could you explain why it does not?

A Yes, sir. I was administrator of order number 3 which was Washington D.C. and also order number 16, which was Baltimore. At the time the Delaware Valley order, still order number 4, all three orders were merged. I had merely assumed

that Johanna Farms at that time under the merged order, the order was changed, that the cooperatives would have to, if they controlled the hauling, would have to advise the market administrator along with the handler, if the handler was to be the-- I am getting too many handlers -- if they were to be the handler on the milk. This I merely assumed was done. It was done in the other two orders at the time of the merger.

It was not done under the old Delaware Valley order. To that extent we were wrong.

On audit we found out we were wrong. However, the provisions of the order were carried out, the report will still come from the same source and the same record will be audited no matter whether Dairylea is the ~~auditor~~ handler or Johanna Farms.

THE COURT: The significance of this I don't understand. I think you'd better make it a little clearer. Does that mean that, I gather that you said that Plaintiff's Exhibit 9, would that make a change?

MISS DAVIS: That is the order I believe to the market administrator. Plaintiff's case

included a number of statements that Johanna Farms was the handler as to the milk from Johanna Farms. It is our testimony here that that simply is not so, that Dairylea is, and that to the extent that the report from Johanna Farms to the market administrator appears to conflict with this, that that is the reason why that conflict; that that report is not controlling and that was the reason for the conflict.

THE COURT: That wouldn't make any difference, would it, in terms of the figures? It would merely substitute Dairylea for Johanna Farms.

MISS DAVIS: It makes a difference in terms of the motion to dismiss, your Honor. That plaintiff was the handler as to all of the milk that was the subject of this action.

THE COURT: Now I understand.

Q When you were referring to the written authorization, Mr. St. Clair, as far as you know, were you referring to the written authorization that is mentioned in section 1004.9C of the order form?

A 9C, that's correct.

Q Are you familiar with the membership of the plaintiff Dairylea Cooperative Inc.? Familiar with the producers who are members?

A No more so than any cooperative. I don't quite understand what you are saying. I don't know what you mean by familiar. In what way, members or --

Q Yes, familiar with who the plaintiff is, and approximately what its members consist of?

A Yes.

Q In terms, Mr. St. Clair, of the number of producers who entered order 4 as new producers, that is, entered order 4 with this percentage base, can you tell us approximately how many people so situated are not members of the plaintiff organization?

A To the best of my knowledge, I would say roughly 50%. I have figures with me in the form of an affidavit as to the total number of new producers under order number 4. I would say roughly 50%, about, of those would not be members of Dairylea.

Q Is this the affidavit to which you refer?

A Yes, it is.

MISS DAVIS: Could we mark this for identification, please.

xxx (Defendant's Exhibit A marked for identification.)

Q Mr. St.Clair, referring to Defendant's Exhibit A for identification, would you tell us what it is and how you arrived at it?

A This was carried out under my supervision, showing the number of new producers in the months of March through September, 1972, under order number 4. By new producer, I meant one that did not have an established price.

MISS DAVIS: I offer it in evidence.

MR. WINTON: I object. It's an affidavit. Mr. St. Clair is here. Why offer an affidavit that he executed.

MISS DAVIS: Do you want him to read it?

MR. WINTON: Whatever you want, but I think the affidavit --

THE COURT: Let me see it, please.

MR. WINTON: If you strike out the verification and let him just put it in as a statement, I wouldn't object, except to its relevance.

THE COURT: All right, I will let it in. I have some problems with this relevance at this point, but I assume that that will be cleared up.

(Defendant's Exhibit A was received in evidence.)

xxx

MISS DAVIS: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. WINTON:

Q When did you make the determination that Dairylea was the handler on these Salem bulk tank routes?

A Four or five weeks ago, I guess.

Q Before or after the action was commenced?

A After.

Q Before that your office audited the reports filed by Johanna and accepted them?

A Yes, and we would do the same if the league were the handler.

Q You mean it made no difference --

A It made no difference to us.

Q It made no difference, did it, in the total possible obligation?

A Not at all.

MISS DAVIS: Objection, your Honor. He answered that question.

MR. WINTON: He said it made no difference to us, and I wanted to make sure --

THE WITNESS: No, to the pool.

Q Let me ask this: The provision that you cited saying you had to file a notice, that has been in the order for a long, long time, hasn't it?

A Since August 1, 1970.

Q '67?

A '70.

Q Hasn't it been in the order before?

A Order 4 just came in on August 1, 1970, which is the middle atlantic marketing order.

Q But in the prior order 4 --

A I had nothing to do with the prior order 4.

Q Your order is a modification --

A No, I was market administrator in the other two orders.

MISS DAVIS: Objection, your Honor.

Q I am interested in whether the order you are now administrator --

A I had no knowledge of what was in order 4 prior to August 1, 1970.

MR. WINTON: I ask your Honor to take judicial notice that that provision was in this order all along.

Q Let me ask this --

THE COURT: What are you submitting that would demonstrate that? Is there something before me that would demonstrate that?

MR. WINTON: What they are saying --

THE COURT: No, is there something before me that would demonstrate that that provision was in there all along?

MR. WINTON: Yes, this is what I gave you before. It's the decision of April 7, 1967.

THE COURT: That's all I asked.

MR. WINTON: Page 5883, second column.

THE COURT: All right. Go ahead.

Q Let me ask this situation: If Dairylea was the bulk tank hauler under contract with the bulk tank hauler with various different producers and had filed back in '67 an agreement with the market administrator by which Johanna agreed to accept responsibility for Dairylea's weights and

tests, would that carry forward?

MISS DAVIS: Objection, your Honor. I don't see that that is proper examination. That doesn't have any relevance to anything that was brought out on direct testimony.

THE COURT: It most certainly does. It has all the relevance to the testimony because your contention is, as I understand it, that Dairylea is a handler, in stating your motion to dismiss on jurisdictional grounds. I gather that what Mr. Winton is attempting to bring out is that that agreement had been reached which is accepted by the market administrator in 1967 pursuant to which Johanna Farms was the handler and therefore sustains their position.

25- MISS DAVIS: Your Honor, this witness has testified that he knows absolutely nothing about what happened at that time. My testimony related only to the present situation.

THE COURT: I am sorry, your objection is overruled. This witness is a Government official. You presented him here as knowing something about the matter, and I think he can answer the question. If he cannot answer it, he

can say he doesn't know. The objection is overruled.

A We made a thorough search. While I know nothing about the order prior to 1970, of the old Delaware Valley order, the records are still available and are still under my control. We made a complete search and could find no record at any time of Dairylea or Johanna Farms filing this request with us.

Q Is it not a fact when you made that search you found out that Dairylea had been shipping bulk tank milk to Johanna Farms at least since '68, and that all that bulk tank milk picked up under identical circumstances with the present milk was being reported by Johanna Farms without any objection?

A No, it had been reported by Johanna Farms.

Q Since 1968?

A I don't know beyond '70.

Q Did you come across this exchange of letters in '68?

A No, I didn't come across any, so I couldn't have come across this.

(Handing to witness.)

A No, I did not.

MR. WINTON: I offer this for identification. I do not have copies, if your Honor please.

(Plaintiff's Exhibit 18 marked for identification.)

xxxx

Q I ask you to read this and state whether it would indicate to you that your office made a check into the way it was reported and the acceptance of the cooperative's weights and measures and accepted it, in 1968.

A I cannot testify as to what went on in Delaware Valley order in 1968. I have no knowledge of it. All I can say is that we made a check through our records and I did not come up with this document.

THE COURT: Let me see it.

MR. WINTON: This document relates to acceptance of the weights as reported by the co-op.

THE COURT: Let me see.

(Handing to Court.)

THE COURT: I think that you can ask

him about who the administrator was and see if you can have him identify the document.

Q Can you identify the signature here?

MR. COPELAND: Pardon me, your Honor. We haven't seen it yet.

THE COURT: He said he never saw it before, but apparently this is a document by his predecessor. He also testified that he had control of the records in the office at the time and he is in control and responsible for the records. He can know whether or not the person whose name is there was his predecessor or the market administrator.

MISS DAVIS: But if he's testified it was not in the records of his predecessor, what possible relevance can it have? Anybody can write a letter to a market administrator.

THE COURT: Overruled.

A This is Mr. Iverson's signature, as far as I can see.

MR. WINTON: I offer this in evidence.

(Handing to counsel.)

MR. COPELAND: I object to the document. I don't think it establishes anything. I don't think

it proves the point that Mr. Winton is trying to prove here.

MISS DAVIS: Furthermore, I don't know that these letters were ever sent by the person they were sent by or received by the person they were sent to, or anything else. They are just two pieces of paper that have come out of your file.

MR. COPELAND: Further, the order provides that both the cooperative and the plant must jointly give notice to the market administrator.

MR. WINTON: This purports to be a letter which the witness identified as having the signature of Mr. Iverson, his predecessor. This purports to be an answer to it.

Apparently the witness didn't find these in his files.

Q Isn't it true that since the date in 1968 to date, the market administrator, so far as you know, on order 4 has accepted Johanna Farms under these circumstances as the reporting handler?

A The market administrator has accepted Johanna Farms as the handler, not under any

circumstances. Not that or anything else, because I wasn't aware of that. When I did make the search, I decided that the league is a handler. Also I may say on August 1, 1970 there was a new order in effect and all our cooperatives in the market along with the concerned handlers send us a letter as to who is the handler.

Q Did you check the agreement to see whether there is in fact an agreement between Johanna and Dairylea under which Dairylea and Johanna have agreed that Johanna should be the reporting handler.

A Filed with our office?

Q Or whether there is ~~certain~~ such an agreement in fact?

A I don't know.

Q It made no difference, did it, in financial returns?

A None whatsoever.

Q Is the only reason you checked in order to try to find a technical objection?

MR. COPELAND: Objection.

MISS DAVIS: Objection.

THE COURT: Objection overruled.

A The question wasn't raised before then.

Q Who raised the question?

A I don't know. Somewhere in the consequence of all of this legality the question came up and I went back and checked.

Q Did somebody ask you to check?

A It seems to me I have heard it all around the place. You, and everything else.

Q You can't remember that counsel defending this case for the Government asked you to do it?

A No, no one asked me to do it. The first time I know about it, when last Thanksgiving Day, or whenever we were here, the question was raised and I went back and checked.

Q What was the question raised?

A Who was the handler, were you a handler or weren't you a handler. There was discussion on it. I remember, right out there in the hall.

MR. COPELAND: I object. He is arguing with the witness.

THE COURT: I do not think he is arguing with the witness at all. This is cross-examination. This is the market administrator. He ought to be

able to take care of himself. He has a pretty responsible job.

Q Would you have raised that question if this case hadn't been brought?

A Probably not.

MR. WINTON: I again renew my offer.

THE COURT: It will be received.

(Plaintiff's Exhibit 18 was received in evidence.)

xxxx

MR. COPELAND: May I ask the witness one question?

THE COURT: It has been received in evidence and when your turn comes you can ask him, after Mr. Winton is finished, you can ask him any question you want.

Q In your capacity as market administrator is it part of your duties to check to see that proprietary handlers pay the uniform base and excess price to their producers?

A Yes, it is.

Q What do you do in the case of a qualified Capa-Volstead Cooperative like Dairylea on that? Do you check that?

A I check to see that they receive the

order prices from the handlers.

Q In other words, you are checking to see that the proprietary handler pays the cooperative the order prices; is that correct?

A I check to see that the proprietary handler pays the producer the correct order prices. The co-op is considered a producer.

By the same token, I check to see that a cooperative charged at least the minimum prices under the order.

Q Looking at the form which your office sent in connection with Honesdale, for instance, for October, 1972 --

MR. HARRIS: Does that have a number?

MR. WINTON: Exhibit 6.

THE COURT: If it is in evidence, show him the exhibit. Do not show him some other piece of paper.

Q I show you Exhibit 6 here which is a statement of the pool obligations of, in this case, Dairylea Cooperative, Inc. at Honesdale. Is that a statement prepared by your office?

A Yes, it is.

Q Is that statement prepared in connection

with the functioning of the producer-handler fund? Producer settlement fund?

A Yes, sir, it is.

Q Is the purpose of that to accomplish the equalization amongst handlers of their class prices and the payment to producers of a uniform base and excess price?

A Yes, sir.

Q To the extent that a proprietary handler gets a credit in lines 15 and 16, does your office check to see that he pays that over to his producers?

A Yes. We ask him to check his payroll.

Q What do you do in a case of a cooperative handler like Dairylea as to those credits?

A The league as any other cooperative has the right to reblend. We do not check that in the case of a cooperative.

26/ Q You treat the cooperative as a producer as if it is entitled to keep those funds.

A Right. As one producer.

MR. WINTON: That's all.

CROSS EXAMINATION

BY MR. COPELAND:

Q Mr. St. Clair, several times in answer to questions you have used the word "the league." By that do you refer to Dairylea, the plaintiff in this action?

A I do.

MR. COPELAND: Thank you.

MISS DAVIS: No redirect, your Honor.

(Witness excused.)

MR. HARRIS: The Government rests, your Honor.

MR. WINTON: Can we just check the exhibits? A question has been raised as to whether one of them was received.

THE COURT: Go over the exhibits. I think there is a question about one of those. Why don't you merely name the exhibits to be sure you have them all.

(Pause.)

MR. WINTON: That's all.

THE COURT: I think there is some question about these exhibits, and I would suggest that either you or Mr. Kolber go over them and be

sure you want them in.

MR. HARRIS: Your Honor, I might say on that one point that while we all agreed that we'd mark the hearing record, we never gave it a number.

THE COURT: It is received as a joint exhibit.

(Joint Exhibit 1 was received in evidence.)

xxxxx

MR. WINTON: For the record, I re-offer all the exhibits that we had marked for identification except 13, 14 and 16, which your Honor has ruled on.

THE COURT: All right. I think that the preferable way to protect your record is that you offer Exhibits 1 through 12, re-offer; I let out 13, 14 and 16. And 15, 17 and 18 are re-offered. Does that include all your exhibits?

MR. WINTON: That includes everything.

THE COURT: All right. They will be received in evidence.

What else have we got?

MR. COPELAND: Your Honor, I have one witness, Dr. Hand. I do not think that the direct would take too long, but I would assume that

Mr. Winton would have perhaps some extensive cross-examination.

THE COURT: It seems to me I am getting a little germ. I think we had better, if it is going to be extensive, if it is going to be about five minutes I would listen to it.

MR. COPELAND: The direct would take longer than five minutes, your Honor.

THE COURT: All right. Let's resume tomorrow at 10:00.

(Adjourned to January 24th, 1973 at 10:00 a.m.)

27/

DAIRLEA COOPERATIVE, INC.
v.
EARL L. BUTZ, Secretary of the Department of Agriculture of the United States

January 24, 1973,
10 A.M.

--

(In the courtroom.)

THE COURT: Mr. Copeland?

MR. COPELAND: I am ready to proceed, your Honor. I call Paul E. Hand to the stand, please.

P A U L E. H A N D, called as a witness, residing at 1429 Miranda Lane, Warminster, Pennsylvania, was duly sworn, and testified as follows:

DIRECT EXAMINATION

BY MR. COPELAND:

Q By whom are you employed, Mr. Hand?

A I am employed by Interstate Milk Producers Cooperative, 401 North Broad Street, Philadelphia, Pennsylvania, as economist and assistant general manager.

Q How long have you been employed by Interstate as their economist?

A Since August, 1957.

Q Is Interstate also a member of Pennmarva, the

intervening defendant in this case?

A Yes.

Q Do you hold any official capacity in Pennmarva?

A Yes. I am the secretary of the corporation Pennmarva.

Q Would you state for the court your educational background, please?

A I have a Bachelor of Science degree in farm management and agricultural economics from the University of Maine, a Master of science degree from the University of Maine in marketing, and a Doctor of Philosophy degree from the Pennsylvania State University, in dairy marketing and in general economics.

Q Have you worked in the area of milk marketing in Order 4 for a substantial period of time?

A Yes. I worked in milk marketing in the Philadelphia area while I was an instructor at the Pennsylvania State University, and since 1957 I have been involved in about 120 different federal and state hearings in the Philadelphia-New York-New Jersey-Baltimore, Maryland, and Washington, D.C., areas.

Q Were you a witness in the promulgation hearing which led to the promulgation of the Order 4 which is here the subject of this action?

A Yes.

Q Are you a member of any committees with respect to milk marketing?

A I have served on various committees in the past. I was the secretary of two Class 1 price studies committees in the Delaware Valley area. I have been on committees of the National Milk Producers Federation, and I usually represent Interstate on the federal order committee of the National Milk Producers Federation.

I have been consultant to the agricultural counsel of California concerning the operation of their milk marketing program in that state.

Q Have you published any papers?

A Yes.

Q Could you elaborate, please?

A I have had publications relating to promotion of milk and the use of promotion programs, and I have had a publication concerning marketing margins and cost of marketing agricultural products.

Q Would you describe for us Pennmarva and basically what is its makeup?

A Pennmarva is made of three cooperatives, Interstate Milk Producers Cooperative, the Maryland Cooperative Milk Producers, and the Maryland and Virginia Milk Producers

Association; each of these cooperatives were and still are the principal cooperative in Philadelphia for Interstate, Baltimore for the Maryland Cooperative and Washington, D.C., for the Maryland-Virginia Cooperative Association.

Collectively we represent about 4500 members under Order 4, which is about 60 per cent of the milk marketed under Federal Order No. 4.

Q Is Interstate the principal cooperative marketing milk in the Philadelphia region of the order?

A Yes.

Q Which is the principal cooperative in the Baltimore region?

A Maryland Cooperative Milk Producers.

Q How about the Washington, D.C., region?

A Maryland-Virginia Milk Producers Association.

Q Could you explain for us what your understanding of the concept of balancing supplies is?

A The concept as used in the daily industry is where you attempt to have enough fluid milk available to meet the Class 1 needs of the market, plus a reasonable reserve and balancing per se is related to the orderly disposition of the reserve, in that there are differences in demand requirements on days of the week, and differences in demand requirements during different seasons of the year.

These differences do not relate exactly to the pattern of production, so it's the handling of this necessary reserve to meet the Class 1 demand requirements that constitute the balancing function.

Q Who carries the principal burden for balancing supplies in Order 4?

A This is handled chiefly by cooperatives and, of course, principally by the members of Pennmarva.

Q What does Pennmarva do with respect to balancing supplies?

A One of the members of Pennmarva has a manufacturing plant which is the largest single handler of Class 1 milk in the middle Atlantic region. In addition, Maryland Cooperative Milk Producers and Interstate, who do not own manufacturing plant facilities, make arrangements through contractual relationships with other handlers to handle any required reserve.

THE COURT: You better explain to me what you mean by principal. I don't understand.

THE WITNESS: Main, largest. In other words, it would be in that context. The various cooperatives, in meeting the Class 1 requirements, have different patterns of demand and we have shipped milk on occasion to the Baltimore handlers and the Maryland-Virginia and Maryland

Cooperative have shipped milk on occasion to our handlers, meeting the requirements of the handlers.

MR. WINTON: May I ask that the witness specify who he meant by "he" and "our." I think he meant the Interstate group.

THE WITNESS: Yes.

Q Dr. Hand, yesterday Mr. St. Clair, the market administrator for Order 4, produced an affidavit which was introduced into evidence as an exhibit, which I believe is marked A, and which purported to show the number of producers in Order 4 shipping into Order 4 without an established base.

Does Pennmarva have members who are similarly situated, shipping into Order 4 without an established base?

A Yes.

Q They would be included in Mr. St. Clair's figures?

A Yes.

Q Dr. Hand, what is the economic value of leveling production?

A Mr. O'Brien pointed out the economic value to cooperatives, but in addition, there are two other economic values.

One is the increase in income to producers

resulting from the balancing or leveling of production since it requires less reserve to meet the needs of a market when you have level production; the resulting price to dairy farmers is higher.

At the same time, there is a benefit to consumers by leveling production in that as you reduce the cost of handling the milk supplied to meet the needs of consumers in the long run the forces of competition will inure these benefits to consumers by reducing the selling price from cooperatives and farmers.

THE COURT: Mr. Copeland, I think you can cut through this for me. I am not, frankly, really interested in-- well, let me see what I can say about it, the economic merits of the plan. I think I will assume that.

MR. COPELAND: All right, your Honor. I won't pursue it any further.

THE COURT: Only to this extent. I am not even sure the plaintiff has demonstrated that. I want to know in what way penalizing new producers to the extent that it has been shown that they are penalized, at least for a period of time, what adverse effect that has upon the plan, the economic plan. It seems to me that that is really the issue. If that is going to upset it, then maybe there is something to be said for it.

I would appreciate your ~~meeting~~ getting whatever information you can out of the witness on that.

MR. COPELAND: Perhaps I will ask Dr. Hand to address himself just to that issue as you have stated it.

Q Dr. Hand, can you address yourself to that?

A Yes. I think the crux of the matter boils down to the question of what happens to the producers who shift in October, for example. And the answer was made, there is no effect, in fact there is a three-pronged impact of producers who shift in October.

First, when producers leave the market, regardless of, in the example, it was Order 2, and we can use that for illustrative purposes-- but when producers leave one market it usually results in an increase in price to the b2 market that they leave, because usually --

THE COURT: We have no proof that they have left that market.

All we have is proof that they have added to their delivery in Order 4.

THE WITNESS: Then the second point is, when producers come on to a new market, usually the impact is to reduce the price to the market that they start shipping into. And by happening at the fall of the year it usually defeats the purpose of one or more of the seasonal

incentive programs in effect in the markets involved.

In other words, each market has a producer supply which has supplied it continuously usually for a large number of years. And to have a sudden insurge of milk at any one season of the year can upset the seasonal pricing plan and cause concern on the part of producers as to the effectiveness of their marketing program and the plan that they have in effect. So in this particular case you have at least three effects that can be demonstrated.

THE COURT: You mean that it was a fear of an adverse effect on the price of milk that is the justification for the limitations on new producers coming into the market, under the particular plan that we have before us in Order 4? In other words, limiting their supply to 60, 70 per cent, and so forth, until the market can absorb it at least for a period of a year; otherwise you are saying it would have an adverse effect on the price, is that correct?

THE WITNESS: Yes. I think it embodies that. It's more than a fear. It is an actual realization because it has happened years in the past.

THE COURT: All right. Is this kind of arrangement true, with these penalties for new producers, is that true in regard to all other markets and orders, or do they

operate different ways? For example, in Order 2 if a new producer coming into Order 2, is his production the same way, and the various other markets?

THE WITNESS: The application of this particular provision is only used in base plans. However, other markets have other systems of accomplishing a similar thing in that they have shipping requirements; each order has shipping requirements on plants. Each order has other types of performance requirements which define those who participate in the pool and those who do not.

This is a standard procedure throughout the entire federal order system. The base plan is not used in all federal orders. It's only used in less than half of the federal orders at this time.

THE COURT: So what you are saying, that in every market that is under the control of the Secretary of Agriculture in terms of regulation, there is some kind of control, it may not be this, which seeks to avoid what the -- what these penalties are designed to avoid under the Order 4 market, is that correct?

THE WITNESS: Yes, it's correct to this extent. In most other markets the performance requirement is on the plant, rather than on the individual producer. It's only in those markets that have base plans where the individual

producer is confronted with a performance requirement such as this. Again, in some base plans and in the base plan that we had before this one went into effect, there were certain months of the year where there was no performance or no assigned base allocated to new producers. They came in on the same standing as old producers. That is, they got the same blend price.

However, now more and more of the base plans do have some performance requirement for new producers, that is, the 12-month base plans and the Class 1 base plans.

THE COURT: This is only operative, as I understand it, the restrictions would be off in March, and then I gather these people will be in a position to be on the same basis as any other producer under Order 4, what is the advantage of -- what is it, nine months or whatever the period is -- what advantage does that have in respect of what you are telling me?

THE WITNESS: Well, it relates to a situation where cooperatives and/or proprietary handlers who operate plants were in a position to bring in supplies of milk during periods of the year and obtain a base in Order 4, then move these plants out of the Order 4 market when the milk would have been considered needed for the market had they been a regular part of the supply. So what they were

doing was moving milk in, in selected months of the year, obtaining a base, then moving milk back into either the New York market or the Boston market when it was to their advantage to obtain the higher seasonal price in that market; then moving the milk or part of the producers back onto the Order 4 market to obtain the base price when it suited the advantage of the particular cooperative or the particular proprietary handler.

So that they were taking an advantage of each of the seasonal plants without really performing the way the plan intended for them to perform for either market. And it was this type of abuse which led the Secretary to conclude that in order to have a functional base plan in the middle Atlantic area he had to have, or the plant had to perform more than for a minimal or token period of time. So his conclusion was that to use October through December as the required delivery period.

MR. WINTON: If your Honor please, I am not objecting, unless we are held precluded by this witness' interpretation of what the Secretary did.

THE COURT: Come on, Mr. Winton. I am asking the witness a question. He has every right to answer the question and you have every right, if the question isn't clear, I mean if the answer isn't correct, you have every

right to examine him.

MR. WINTON: I was only suggesting, if your Honor please, that the question of what the Secretary did in this decision is explained in his decision.

THE COURT: But you have every right to bring that out. Maybe I am asking the wrong question --

MR. WINTON: No, I am not suggesting you are.

THE COURT: I am trying to understand this, and hopefully you and Mr. Copeland, if I am going wrong, can clarify it by questions that you ask.

MR. COPELAND: Is there anything else that your Honor would like to ask him?

THE COURT: Well, I am not exactly clear on some of these things, but at least it's been opened a little bit.

MR. COPELAND: My difficulty, your Honor, is that I can't anticipate exactly what you are having trouble with.

THE COURT: I think, Mr. Copeland, I have tried to make it very clear what I think the issue is. I am trying to find out the justification, if there is a justification, for the restriction. That is what I was trying to find out. I think that, I mean I am frank to say, I indicated before that my feeling abot this is that the plaintiff's case, if they have a case, is based on discrimination. It may well be that discrimination is justified. It may well be that

that may not be the issue. But it certainly seems to me that that is what the question is. What I am trying to find out from this witness is wherein is the justification for Order 4, the Order 4 market to restrict, place restrictions on persons who newly entered into it. I think that is the issue here.

T2 Q Doctor, have you completed your explanation on the conditions in the promulgation order?

A The only other point I would add is there was found to be an economic difference between plants and distributing plants and these differences are first, supply plants are usually located in the country, a distance from the city where milk is distributed and usually milk associated with supply plants has a lower value and milk associated with city plants, this lower value is reflected, of course, by transportation differences, Order 4, for example, at the Honesdale plant, has a minus 21-cent differential and Order 2 and the association Dairlea carries a minus differential in the schedule of some 12 or 13.2 and 14.4 cents for each producer located in that area so it does have a lower economic value.

Second, supply plants are very flexible in that they usually ship milk to whichever market that it is needed and each order has performance requirements on

supply plants. The reason it has performance requirements is that the theory is they will ship where the milk is needed; however, experience has shown that both cooperatives and proprietary handlers have the ability to move the milk to the market where it carries the highest price and they usually have either distribution plants of their own or relationships with handlers where they can meet performance requirements at a time when the milk may or may not be needed for the markets so the requirements standards are rather specifically stated to avoid this shifting to solely meet the highest price to place standards so that the milk will go to the market where it is associated and intends to be associated for a longer period of time.

THE COURT: What about the issue here of the old persons who are already serving the market, utilizing the plan to keep out competition?

THE WITNESS: Well, the people serving this plant have always been Dairylea, so they are not keeping out-- I mean, there is no other group that's serving this particular plant to the extent that Dairylea has always served the majority requirements of this plant, and basically what has happened is that this plant has acquired the business of another plant and did not acquire the supply that went with that other plant and Dairylea has come in to

meet the supply requirements that were formerly furnished by other producers.

BY MR. COPELAND:

Q You mean other producers are in Order 4?

A This was another Order 2 operator, not another Order 4 group of producers. Do you have another question on that line, sir?

THE COURT: I think you better explain that because that makes the situation to me sound worse than it had been. Am I to understand you to mean that the plant-- what plant are you talking about now?

THE WITNESS: Well, Johanna Farms is a distributing plant.

THE COURT: All right, does Johanna Farms --

THE WITNESS: Another distributor.

THE COURT: Another distributor in the Order 4 region?

THE WITNESS: In New Jersey who served both the Order 4 and the Order 4 market.

THE COURT: I see. And --

THE WITNESS: It was an Order 2 plant.

THE COURT: The supply plant was an Order 2 plant, is that what you said?

THE WITNESS: The milk which was delivered to the

plant which Johanna purchased was regulated under Order 2; the same as the milk, for example, that Dairylea furnished Johanna until they decided to put the plant under Order 4 was also regulated under Order 2.

THE COURT: I see. How does one -- explain this to me, how does one originally in Order 4, how is the original distinction made between an old producer and a new -- how did you originally get a base, from the very beginning?

THE WITNESS: Well, in the same fashion that is provided now; that is, those producers who ship during August through December were given credit for their production and a base calculated from that production.

THE COURT: Originally?

THE WITNESS: Yes, sir.

THE COURT: Therefore, they kept it up -- I see. So that --

THE WITNESS: And it's a continuing thing. Each producer's base is made new each August through December.

THE COURT: All right. Suppose if someone comes into an Order 4 region in August, then he gets -- what happens then, does he get --

THE WITNESS: He gets the percentage base. He gets 70 per cent of his production is base and 30 per cent

is excess.

THE COURT: If he ships them from August to December, he's under the same restrictions as he became in October, is that correct?

THE WITNESS: Yes, sir.

THE COURT: So that there is no real difference--the difference is whether you're new or old, is that correct? Whether you have been operating under there for a period of time?

THE WITNESS: There may be producers who are old producers, who elected to use this 70 per cent base also.

b2 THE COURT: I know, but --

THE WITNESS: But that's the difference, yes, sir. The producers who start shipping new on the market ship with the percentage base rather than with his production history as a base.

THE COURT: All right. Now, what I wanted to find out was, did all producers, when Order 4 was promulgated, did all producers start on that basis or did some of you -- were some of you able to get a 90 per cent base from the very outset?

THE WITNESS: There is no such as a 90 per cent base. I wanted to clear that up. Each producer, once he has a base, is on his own as far as his base milk is

concerned. Anything he produces over that base is excess, so he gets 100 per cent base price for his base production and anything over that he gets the excess price.

THE COURT: I see. But how do you get that?

THE WITNESS: The original -- when the order was first obtained, when the three markets were combined, the original period there was no base operating provision at that time.

THE COURT: I see.

THE WITNESS: So that all the producers who supplied the market that first year all received a blend price; this blend price averaged about 20 cents under the base price; in other words, by going on a blend price the average is about 20 cents under the base price.

THE COURT: I see.

THE WITNESS: The effect of the base plan is to increase the price available to a farmer who stays within his price by about 20 per cent per hundredweight.

THE COURT: All right, I think I understand.

BY MR. COPELAND:

Q Dr. Hand, in your expert opinion, would there be any effect upon Order 4 producers if the base excess provisions of the order was eliminated?

A Well, if they were eliminated and no seasonal plan

substituted, the effect on Order 4 would be rather catastrophic because the blend price then would be substantially higher in the spring months than in all surrounding markets and the incentive then would be fore producers to come on to the Order 4 market in the spring months when milk is not needed and when the surplus is greatest in every area and then in the four months the blend price, in Order 4, wouldbe lower than surrounding markets and all the milk would have a tendency to leave Order 4 to go to the higher paying markets and this would reduce the supply to the Order 4 marketing area at a time when milk was most needed so the results would be, as I say, catastrophic and uneconomic in every respect.

THE COURT: You mean there would be a tendency to glut the market when the supply was high and to pull out of the market at the time when the supply was not?

THE WITNESS: Yes, sir. If the base plan were eliminated and you went on a straight blend price market, that's exactly what would happen.

THE COURT: All right.

MR. COPELAND: That concludes my direct testimony.

THE COURT: Do you have any questions of this witness, Miss Davis?

MISS DAVIS: No questions.

CROSS EXAMINATION

BY MR. WINTON:

Q In response to some of the questions asked, you indicated there was a possibility of abusing both the Order 2 and the Order 4 pools by shifting back and forth, did you not?

A Yes, sir.

Q You didn't mean to indicate that this possibility existed by shifting into Order 4 in the fall months, did you?

A Yes. Yes, it happened by a ~~planned~~ plant shifting and I believe in one month in acquiring a base.

Q That was in connection with the transfer of bases?

A The transfer of milk, the transfer of bases was secondary. It was the transfer of the plant to acquire bases which caused the problem.

Q What did it cause a problem, what was the problem, that they transferred the bases?

A They obtained bases and were then eligible to ship at any time throughout the following marketing season. Once the producers shipped into a plant to get a base, they can ship at any time they want to under the market and obtain the full base value for their production.

Q Now, you're talking about the old plan.

A Yes. That's an abuse you have reference to that I have reference to, I'm sure. They can't do that now under this plan.

Q Wasn't your testimony at the hearing record related to the plants coming in in the flush season and doing that?

A Either time of the year.

Q I'm asking you what the testimony was in fact at the hearing.

A I don't recall what the specific testimony was, but the opportunity was available at either time of the year.

THE COURT: Well, you don't have to go into that, Mr. Winton. What I understand the testimony to be here on direct, that the danger was you come into the market flush time of the year and leave the market other times. That's what I understand Dr. Hand telling me.

Q Now, if a plant comes in in the fall now, and his producers get bases, can they be assigned?

A No, they cannot be transferred to other producers, if that's what you mean by assigned.

b3 Q So, if a plant left, its producers could not transfer those bases?

A That is correct.

Q Now, wasn't that the evil which the Secretary addressed himself to?

A Yes, that was one of the evils, yes, sir.

Q So that was cured by prohibiting the transfer of bases, was it not?

THE COURT: That's from one producer to another?

Q Yes?

A That cured one aspect of it, yes.

Q Now let me ask, in the fall months, it is true because of the the Louisville plan in Order 2, that the blend prices are higher in Order 2 generally than the blend base, and excess blend in Order 4?

A Yes.

Q Now, under those circumstances, the incentive is to leave Order 4 and go to Order 2, isn't it?

A Yes.

Q Now, why is it necessary, therefore, to restrict an Order 2 plant from coming into Order 4 under those circumstances when it would have to sacrifice some of the returns?

A There is no restriction on the plant coming in; the restriction is on the allocation of a percentage base as compared with giving those producers a full

production base.

Q Well, when the plant comes in --

A The plant can come in and ship at any time.

Q Let me ask you this: when a plant comes in, the plant's in one order or the other, it has to pay its producers a competitive price in a producing area, doesn't it?

A On a 12-month basis, yes. Not day by day or month by month.

Q Well, when the plant ships and these producers are denied a base, the amount of money which the handler gets to pay his producers is less, isn't it?

A Less than what?

Q Than if his producers had a full base.

A It may or may not be depending on the business of the individual producer; on the average, the aggregate amount is less, yes.

Q Well, you know the aggregate historical amount of bases is 90 per cent, isn't it? Isn't 90 per cent of the milk, under Order 4 base milk, on the average?

A Yes.

Q Or over?

A Yes.

Q And this base which you have given arbitrarily

averages out only 60 per cent, doesn't it?

A Well, 70 per cent during the four base months in the fall and then 60 per cent the other three months so the average--

Q Well, it is 50 per cent?

A It would average 65 per cent starting in the fall.

Q Doesn't it average 60 per cent when you --

A For the 12 months, yes. If they started in March and shipped the full 12-month period it would average 60 per cent.

Q So, you have given a 60 per cent base to the newly entering producers as against a current base production of 90 per cent for the old producers in the order, isn't that correct?

A Well, no; it's not correct. The 90 per cent has no precise relationship to any individual producer; individual producers -- many individual producers could be way below 90 per cent and some individual producers, as a matter of fact, about half of the individual producers, have a hundred per cent base, so the 90 per cent is not applicable to any one producer; that's the point I'm trying to make.

Q But the average is 90 per cent, isn't it?

A It may or may not be depending upon the supply

of milk. I don't think --

THE COURT: Well, you know -- I think you told me that in any event that once you have been, say an old producer, you're entitled to a base and you may provide 100 per cent of that base?

THE WITNESS: Yes, sir.

THE COURT: In terms of the market; but a new producer, at least for the period, at least for the limited period of time is limited to some restrictions?

THE WITNESS: Yes.

THE COURT: I think --

THE WITNESS: My argument is 90 per cent is not a precise standard.

THE COURT: You know, that's a technicality in regard to it, I'm not really very interested; the issue, it seems to me, is whether or not there is in fact-- the fact is new producers come in on a different basis than those who are older?

THE WITNESS: Yes, sir.

THE COURT: That's clear.

THE WITNESS: Yes, sir.

THE COURT: Let me ask you one other question -- excuse me for interrupting.

MR. WINTON: That's quite all right.

THE COURT: What about an old producer, can he, in Order 4, who has a base, can he enter into other markets and still keep his base; in other words, can he go into the market that's covered by Order 2 in certain periods of time and then come back and still have the same base he had before?

THE WITNESS: Yes. For that one marketing year. In other words, if he shipped August through December and obtained a base, then that base only applies for the following marketing season; now, if he leaves Order 4 to ship to another market during the base period, let's say August through December of the next year, then he won't have a base. He would not have a base the following year; he could come back as a new producer.

b4

THE COURT: I see. All right.

Q Now, you also talked about the problems of maybe having too much milk in the short season of production and the fall in your direct testimony.

A Yes. If the base plan were eliminated and no seasonable plan reinstituted, that is correct.

Q Oh. With a lot of "ifs" then?

A Only one "if". If no seasonable plan were reinstituted.

Q Under the old plan which you had immediately prior to the present plan under Order 4, had a seasonable--satisfactory seasonable level of production, been obtained?

A The seasonal level of production was less satisfactory then than it is now. The continuation of the base plan has improved it through 1972 and the operation will continue to improve it, we assume.

Q Well, could you answer my question, which is whether you --

A No, we didn't have a totally satisfactory season of pattern production, nor do we now have a totally satisfactory --

Q Didn't you testify in the hearings that led to the present Order 4 plan that the seasonable pattern of variation was satisfactory? You don't recall doing that?

A I don't recall placing that much emphasis. I think I indicated it had improved and it continues to improve under the base program operation.

Q Just one second.

THE COURT: Mr. Winton, if you are going to ask Dr. Hand about any testimony or statement he made prior to this time, I would suggest that you ask him precisely, give him the reference precisely what he did say.

MR. WINTON: That is what I am about to do, your

Honor. I'm just looking for it.

Q I read to you from page 737 of your testimony, in the promulgation hearing:

"Q How long was the present base plan in effect in Philadelphia; when did that begin?

"A About two years.

"Q Would you say it has worked well in those two years?

"A As far as leveling out seasonable production, it has, yes. As far as creating a collateral problem in that sense of the word, it has not contributed to orderly and stable marketing."

Q Is that your answer?

A Yes, but I didn't say at that time, nor would I say now, it is totally satisfactory. We are striving to continue to level it out. It had leveled out up to a point and it continues to level it out.

Q You say it had been satisfactory as far as --

A Well, the plant part -- excuse me --

Q Had it been satisfactory? You just wanted to polish it up?

A Sir, the plan itself was working satisfactorily on leveling out production, but your question was, is the seasonality of the production satisfactory, or were we

satisfied with what it had done as far as it had gone. My answer was we were satisfied to that point and we are satisfied it is going to do a better job.

Q Now, let me ask you another question; you were talking about and we started off on the question of shipping supplies in October; didn't you testify that the market was still short in October in Order 4 and that it was necessary to put some seasonal emphasis on the fall production ?

A Yes, I assume that we did at that time.

Q Is that still your position?

A It is less short now because we have had a tendency to level out production somewhat since that time. Also, the class 1 utilization has been reduced since that time to now. We have a lower class 1 utilization than we had in 1967 during the fall months so we have had an increase in fall production.

Q But, is it still necessary to have emphasis on fall production under Order 4?

A Well, the greater emphasis is on leveling seasonable production, not specifically on increasing all production per se.

Q Could you answer my question?

A Yes.

Q Is it still necessary to have an emphasis on

fall production?

A Not to the extent it was in the past, no.

Q But it is necessary or not; I am not asking to what extent.

A Well, I am answering you, sir, but saying the greater emphasis is on level seasonable production, not specifically on fall production --

MR. WINTON: I move to strike the answer.

MR. COPELAND: Your Honor, it is responsive. The answer is responsive. He asked a question and Dr. Hand answered it.

MR. WINTON: He has not answered my question.

THE COURT: I don't think he has; I don't think he has.

THE WITNESS: The answer to the question, sir, is yes, but to a lesser extent than in the past.

THE COURT: Now, that is an answer to the question.

THE WITNESS: Yes. I assume I had said yes; if I had not, I'm sorry, your Honor.

b5

Q As a matter of fact, didn't you testify that the seasonal pattern of production in the Middle Atlantic region -- that is the Order 4 region, isn't it?

A Yes.

Q Has improved over the years and is now as level as the seasonable pattern of class 1 sales?

A Yes, but the point that I was making at that time was that the percentage high to low months were approximately the same; the percentage of high months of production still does not correspond to the percentage of high months of sales and vice versa. We still have slight seasonable imbalances in that the high months of production is still May; the high months of sales is different than May. We have shifted the low month of production from November to July so that we now have a much more even variation in production than previously.

THE COURT: Mr. Winton, would you be good enough—you have read two statements, prior statements by Dr. Hand; and I don't believe you indicated one, where you are reading from, page and so forth; I suggest that you do that for both of them.

MR. WINTON: All right. The present statement was read from page 716 of the promulgation record.

THE WITNESS What is the date on that, sir?

MR. WINTON: It was August 7, 1969.

THE WITNESS: Yes, sir.

MR. WINTON: The prior statement, I believe I indicated.

MISS DAVIS: 737, yes, you did.

THE COURT: What is it called; promulgation record it is called?

MR. WINTON: That is called the record on which the Secretary promulgated this order; it is in joint Exhibit 1; joint Exhibit 1.

THE COURT: By the way, while we are on joint Exhibit 1, I am sure that none of you gentlemen expect me to read all these documents; so my suggestion is whatever you want me to read from that joint Exhibit 1, each of you had better indicate what pages you want me to read; otherwise, I will be on this case until next year some time.

MR. HARRIS: Your Honor, we had already prepared Xerox copies of the sections that we thought were pertinent and will submit them, I assume, in a post-trial brief.

THE COURT: It just occurred to me last night you have given me a task of a cruel and unusual punishment, and I am not too willing.

MR. HARRIS: I might say the Xerox portions are considerably shorter than the box.

THE COURT: All right.

Q Wasn't it also that the main concern expressed by the producers' witnesses which the Pennmarva Co-op called at these hearings, producers in plant shifting during

Order 4 during the flush season?

A That was one of the concerns; I don't know if that was the main concern; the main concern, as I recall and always has been the main concern of dairy farmers, is the reduced class 1 utilization. And I think their concern was first class 1 utilization and then, secondly, things that were associated with that, one of which was the shifting.

Q I asked you whether you did not testify as follows on page 739 of the record; you were then being questioned about the then current plan, the present form, before the amendment of the base excess plan under Order 4?

A That was the previous base excess plan that you are talking about, yes.

Q And the question is: "Were it continued in the present form, would it not continue to provide reasonably level production in the market?" That was the question.

A Yes.

Q "A Well, it places emphasis on production; the base making months, and we feel if it were continued for an extended period of time, the emphasis would result in too much production during those months relative to the other periods of the year" --

MR. COPELAND: The other months of the year.

Q "Other months of the year".

A Yes, this was when we had the base making months in the fall and there was concern about the emphasis of production -- on production, during this time resulting in there being undue shift toward the fall months of the year. This has been described by many as the so-called race for base.

T3 Q I call your attention to the fact that you said if it were continued for a period of time, right?

A Yes, extended, extended several years, yes.

Q One of the witnesses that the Cooperative Penn-marva group offered is a gentleman by the name of Lester C. Jones, was it not?

A Yes.

Q Do you know who Mr. Jones was?

A Do I know who he was?

Q Yes.

A Yes. At the present time he is president of Interstate. But at the time he was a dairy farmer. A director, not president. He's since been elected president.

I might add, he is vice president of Penmmarva.

Q He was asked at page 925:

"Q On the statistics as a whole, although I guess you have not seen those, do you know whether or not you

have out of the Order 4 market or the Order 3 market or the Order 16 market?

"A I'm not familiar with that.

"Q You do not know how close you are to that, then?

"A No.

"Q So you are not sure that you conceivably do it in the market in the fall?

"A No. This was in effect in New Jersey. It takes a long time for this to build up. It is not going to happen in a year or two or three or four."

Do you remember those answers?

A Yes.

Q And he was saying, was he not, that the feared increase in fall production was not going to happen in a year or two or three or four.

MR. COPELAND: Just a moment. I'd like to interpose an objection, your Honor. He is cross-examining Dr. Hand on something that Lester Jones testified to, and I don't understand the purpose of that. It wasn't Dr. Hand's testimony.

MR. WINTON: Dr. Hand is here as a representative of Pennmarva. This is the president of Pennmarva --

MR. COPELAND: I'm sorry. He is not the

president.

MR. WINTON: He was the vice president of Pennmarva and the president of Interstate--

THE WITNESS: Not at that time he wasn't.

Q He is, isn't he?

A He is now, yes.

MR. COPELAND: Even so, your Honor, I don't see how he can cross-examine Dr. Hand on Mr. Jones' testimon

THE COURT: I have some difficulty with that myself. Mr. Copeland, I am afraid I have to agree with you.

Q I will withdraw the question and ask it directly.

It would be necessary in order to have this effect that you were worrying about, you claim, of excess production in the fall to have it in effect for much more than three or four years.

A Yes, an extended period of years. No doubt about that.

Q It would not be an immediate result?

A No, sir.

MR. WINTON: Could we have a short recess, if your Honor please? My associate counsel has requested some things to discuss with me.

MR. KOLBER: Five minutes, your Honor.

THE COURT: I will give you some time. You can go out and have your recess and come back.

MR. HARRIS: Mr. Winton, do you have much more?

MR. WINTON: I will know when I come back.

MR. HARRIS: Are you putting on --

MR. WINTON: No, no further testimony.

MR. COPELAND: Do you have any objection if we talk to Dr. Hand? I know you are in the midst of cross-examination.

MR. WINTON: I think it would be best--

MR. COPELAND: All right.

(Recess)

Q In your direct testimony you referred to some of the problems being met by pooling standards, did you not, of plants, which you had described?

A You mean as provisions used by Secretary of Agriculture in other orders?

Q Yes.

A Yes.

Q That is the usual way of dealing with the problem under the orders; isn't it? To find out which producers are associated with the order by pooling standards for the plants?

A Yes.

Q Order 4 does something over and above the usual thing which this base and excess plan does, does it not?

A Yes.

Q The fact is that the plants involved in this case to which the plaintiff's produceres delivered, did meet the pooling standards, didn't they, of Order 4?

A Yes.

Q So in addition to meeting the pooling standards, it had a restriction over and above this?

A Yes. There is this added base relationship. But that relates to a further dovetailing or a further coordinating feature between the two orders with different seasonal plans. It is not often that you have different seasonal plans between markets as close as these two markets, and I might add as large as these two markets.

New York is the largest market in the federal system, and the middle Atlantic order I believe is the third largest order in the system. So you have two very large marketing areas here.

Q In your direct testimony you described the catastrophic situation which might exist in Order 4 had no seasonal plan and the surrounding orders had the seasonal plans like the Louisville plan; isn't that correct?

A Yes.

Q Would that catastrophic situation have been rectified if Order 4 simply adopted an equivalent Louisville plan?

A Well, it would not be as catastrophic as I described. However, the Louisville plan when once employed by a segment of the Order 4 market was found to be unsatisfactory and, in fact, the Louisville plan in New York has not improved the seasonal pattern of production to the extent that the base has in Order 4. So the Louisville plan does not serve the total market requirements.

THE COURT: Found unsatisfactory by whom?

THE WITNESS: On the basis of the actual percentage change.

THE COURT: By whom was it found unsatisfactory?

THE WITNESS: By the Maryland Cooperative Milk Producers when they had a Louisville plan in the Baltimore market.

THE COURT: You mean the group that was supplying didn't like it; is that what you are saying?

THE WITNESS: Yes, sir. It did not level out production. The Maryland Cooperative found that it did not level production to the extent that the base plan does.

Q The Secretary in this decision said the Louisville

plan is a satisfactory way of leveling production, didn't he, in his order?

A In Order 2, yes, sir.

Q Now, he said in this particular decision on Order 4, didn't he? He said that, did he not?

A I don't know.

MR. HARRIS: Could he just for the record say which decision?

MR. WINTON: The May, 1970, decision. I am reading from page 7936 of the Federal Register, column 3 in the middle of the column it says "Both the base excess plan and the Louisville seasonal incentive pricing plan obviously can be effective in promoting a desirable seasonality of production in any particular market."

He said that, didn't he?

MR. HARRIS: Objection, your Honor. The record speaks for itself. I don't see what we are gaining by asking the witness, unless Mr. Winton is claiming that this is not a proper copy of what the administrator said.

THE COURT: I agree with you entirely, Mr. Harris.

MR. WINTON: On cross-examination he said it was not satisfactory, and I am saying that--

THE COURT: You can point out what the

Secretary said, but you don't need to ask him if the Secretary said it. Obviously he said it. It's in the record.

Q Forgetting the other questions of whether the producers were satisfied with the leveling of production, so far as the catastrophic marketing situation because the difference in blend prices under the other orders was concerned, if Order 4 had a Louisville plan you would avoid the catastrophe you pointed out for the court, wouldn't you?

A If we had a Louisville plan identical with New York, yes, it would eliminate most of them.

Q You said you felt it was possible under some circumstances of plants coming in in October to reduce the blend price to Order 4 producers; didn't you, in your direct testimony?

b2 A Yes.

Q In this particular case with the producers involved here, was that the situation?

A I do not know. I do not know how the milk was accounted for between Order 2 and Order 4, so I can't answer that.

Q Maybe I can help you in a hypothetical question--

A This is a specific case. In a hypothetical

question maybe, but in this specific instance I can't answer it. I don't know how the milk was allocated in Order 2 when the milk was priced and pooled under Order 2.

THE COURT: I think what Mr. Winton is trying to say to you, Dr. Hand, he is going to give you what the facts are and pose some hypothetical and see if you can answer it. If you don't know the facts, he is going to give them to you.

Q If all of the producers of the plaintiff cooperative here had been delivering in Order 2 before and they switched to Order 4, to Johanna and Johanna's utilization was a greater percent class 1 than the market average in the Order 4, and the utilization had previously been assigned to Order 2, what would the effect be on the pool of Order 4?

A I can't answer based on that. What utilization had been assigned to Order 2?

Q All the class 1 utilizations.

A If it had all been assigned to Order 2, it would improve the Order 4 situation. However, I cannot visualize any condition or accounting procedure where all of the class 1 would have been assigned to Order 2. There would have been some class 2 assigned to Order 2. If there were any class 2 at Johanna at all.

Q If the percentage of class 1 utilizations at Johanna was greater than the Order 4 market pool and that it had been assigned pro rata to the Order 2 pool, wouldn't the effect of changing these utilizations from the Order 2 pool to the Order 4 pool be to increase the level of the blend price in Order 4?

A Not necessarily. It still depends on the specific class 2 allocation.

Q Do you see the calculation Mr. O'Brien made, that was offered in evidence yesterday?

A Yes.

MR. HARRIS: Could we just find out which one?

MR. WINTON: Yes, I will get them for you.

THE COURT: You are not merely doing that, Mr. Winton, for Mr. Harris' benefit, you are doing it for your own in order to protect the record.

MR. WINTON: Yes, sir.

Do you have Exhibit 12?

(Handing)

Q I show you Exhibit 12 which was received in evidence yesterday and ask you to examine it.

A Yes.

Q Would you agree that under the facts shown in that exhibit the price in Order 4 was increased as a result

of the shift?

THE COURT: You mean the shift involved in this case?

MR. WINTON: In this case, your Honor.

A This particular transfer would have improved the class 1 utilization in Order 4, yes.

Q Is it conceivable that a handler who was regulated by Order 2 could benefit at the expense of Order 4 by shifting his plant regulation by appropriate steps to Order 4 in the period of October and November and December of a year?

A Yes.

Q Will you explain how?

A Well, principally the impact of cost of procurement for any handler who had class 2 milk, for example, would improve by coming under Order 4 in that the bulk tank milk in Order 2 is priced FOB the farm with a ten-cent credit for hauling; whereas in Order 4 the milk is priced FOB the plant. So we would gain a procurement advantage by coming into Order 4 as compared with Order 2.

Q Is it possible for a handler to meet the pooling shipping requirements of Order 4 in the short months by getting predominantly class 2 milk?

A It wouldn't have to be predominantly class 2.

It has to be 50 per cent. And this plant I think had about ten million pounds of milk, so that would give you five million pounds of class 2, which is a substantial volume amount.

Q You are saying it is possible. Is it usual? Is that the usual or conceivably ordinary situation?

A That is one of the situations that we have always been cognizant of in the milk shed.

Q Shifting into the pool in October in order 2--

A Of shifting into the pool at any time in order to gain a competitive buying advantage.

Q Isn't it true --

A Not only October, sir. Any month.

Q Let us get back even to that situation which you have dreamed up. Let me ask this: the price which the plant shifting in would get out of the pool would be the base excess price under Order 4, wouldn't it?

A No. A proprietary handler shifting in gets no profit out of the pool. He pays into the pool on his class 1 utilization and draws out on class 2 and has no basic relationship to the base excess operation. You said a proprietary handler at the start of the question. I thought that is what we are discussing.

Q I am talking about a propriet ary handler now.

Let us see if we can't talk on the same plane. The way the equalization works under the pool is when a handler pays in the class price he gets credit for what the minimum price is that he has to pay the producers.

A Yes. He gets credit against his utilization price.

Q He gets credit at the blend price?

A That's correct. That is his utilization price.

Q That is not his utilization price. That is the price he has to pay his farmers.

A I think you are misspeaking. What he gets credit for is the utilization price. It is debited for the blend price and the difference between the debit and the credit is what he either pays into the pool or takes out of the pool.

Q Maybe we are using the words in different context. He has to pay into the pool for the milk at the class prices and it's that obligation is diminished by what he is supposed to pay his farmers at the blend price?

A That's correct. Or that obligation may be increased if he is above the market average. He may have to pay into the pool rather than take out. It's a debit and credit operation.

Q The thing that reduces his pool obligation is

the amount he has to pay his farmers as the minimum price, isn't it?

A No, sir. His pool obligation does not change. His pool obligation is the difference between his actual utilization and the average utilization of the market.

Q I show you Exhibit 10, which is a calculation of Johanna's pool obligation. Handler's pool obligation is the amount at the class price, right?

A Yes, line 14 is his net pool obligation.

Q It says credits here, does it not?

A Yes.

Q Isn't one of the credits the producer milk base at uniform price --

THE COURT: Mr. Winton, you are not intimidating Dr. Hand, but you don't have to hover over him that way.

MR. WINTON: I cannot read it, if your Honor please.

THE WITNESS: That's right. He is not disturbing me.

MR. WINTON: Dr. Hand and I are old friends. We are not hostile. We have appeared at hearings many times together.

THE COURT: All right.

Q Lines 15 and 16, which are entitled credits,

give the handler a credit against his pool obligation which was at the class price for the producer milk at the base and excess uniform prices; isn't that right?

A Yes.

Q So that we understand, that is what I was trying to get.

A And his net producer settlement is the difference between those two.

Q Which may be more or less, in other words--

A That's correct.

Q However--

THE Witness: That is the utilization that I was talking about. Utilization of producer milk.

Q A handler, whether under Order 2 or Order 4 in the production area would have to pay, wouldn't he, a competitive price to get this milk, which would be--

A Well, again we are talking about a price on an annual basis. We are not talking about a day to day price.

b3

Q When you buy milk from a producer you have to keep it competitive; he wouldn't get, would he, as an allowance from the pool as these credits, the amount he had to pay the producer to get the milk competitively?

A No. If he had to pay a premium or if he had

to pay hauling, that would be an added cost. Is that what you have reference to?

Q Yes. Actually it's unlikely, isn't it, that it would ever be to the advantage of a handler to shift from Order 2 to Order 4 in the fall season.

A That is the most advantageous time to do it, as Mr. O'Brien pointed out, to shift from Order 2 to Order 4 in the month of October. That is the most advantageous time to do it. And if it is going to be done, it's likely that that is when it would occur.

Q Let me ask you: when you said it was the most advantageous time, you mean it's the time on which Order 4 imposes the least penalty, don't you?

MR. COPELAND: Objection, your Honor. He is using the word "penalty" here again. Don't characterize.

THE COURT: What, advantageous?

MR. COPELAND: No. He used the word "penalty." I am objecting to Mr. Winton using the word "penalty."

THE COURT: I have used it. It is clear to me.

MR. COPELAND: I beg your pardon.

THE COURT: That is the only way I can understand it.

A That is the time it would be most advantageous or, as you state, impose the least imposition on the

handler, yes.

Q Isn't it also the time when the credit that the handler would get from the Order 2 pool for the blend prices would exceed the credit he would get under the Order 4 pool?

A Stated another way, that is the time normally when the Order 2 payout is greatest, that's correct.

Q So that if there was a shift of regulation from Order 2 to Order 4, that wouldn't be riding either pool, would it, or taking advantage of either pool?

A Under the present provisions, that's correct.

MR. WINTON: That is all.

BY THE COURT:

Q I think that the way I understood your testimony was that one of the justifications for the penalty— Mr. Copeland -- against new producers coming in was the fact that they could come in in the flush season and glut the market and leave in the short season and leave in the short season as milk was needed.

A That is one of the circumstances that prevailed before this plan, yes, sir.

Q That is the circumstance that I understood you to say that this plan was designed to prevent.

A One of them, yes, sir.

Q One of them, all right. In this particular instance, as I understand it, these people came in in October and are now under -- and you will explain it to me a little further if I do not understand it -- penalties or whatever as against old producers in Order 4; and they will be under that until March of this year; is that correct?

A Yes, sir.

Q Thereafter, that I think, and this is as I understand it, they will then be free to be up with the old producers during what is described as the flush season. How does this particular way that it is operated give the kind of protection you tell me it was designed to achieve?

A They will be in for the entire marketing season; in other words, they will have the base for the entire year, not for only the flush season.

Q I know that, but then when the flush season comes they would be on the same level as old producers, wouldn't they?

A That's correct. And at that time the prices then dropped in all of the other markets, and they will not be encouraged to go to the other markets. They would be encouraged to stay on Order 4 for 12 months.

So it becomes a matter of in a 12-month period they will obtain enough money over and above a blend price in Order 4 to pay for this five-month period in which they were "penalized."

In other words, the added income over the 12-month period will about compensate for that five-month period of delivery. So the incentive is to stay in Order 4 for the 12-month period. That is the first year.

After that from each year from then on out they are able to obtain about a 20-cent higher price for base milk than a blend price for the market. So the reward then is to stay on Order 4 until the order is changed.

THE COURT: All right. I won't pursue the matter any further, but that is one of the issues I want counsel to address themselves to in post-trial memoranda.

Anything further?

MR. WINTON: I would like to ask this one question.

CROSS EXAMINATION

BY MR. WINTON:

Q This five-month penalization when the new producer comes in, he never gets that money back as

compared with other producers who are under the order?

A He gets a reduced base compared to what might have been his historical base during that period of time, that's correct. He never gets that base made up as such. What he gets is a higher income for his base milk the following year.

Q That is what all producers get?

A Yes, sir.

Q But he never gets back the amount he lost for the five months which he entered as against other producers?

A If we had a blend price program he wouldn't have gotten the same situation either, so it's not a total loss in the sense you are using the word. The answer I believe is yes, the way you framed the question.

THE COURT: Thank you, Doctor.

(Witness excused)

T4

MR. COPELAND: Your Honor, the intervening defendant rests.

THE COURT: All right. Anything further?

MR. HARRIS: No, your Honor. The government rests.

THE COURT: As you gentlemen know, the issue that is present here -- I think some of you have different concepts about it -- but I suggest you deal with my little problem as well as whatever else you think is pertinent; but the issue that I think is present here is the question of discrimination against new producers who enter the market and the justification for that in terms of the economy of the Order 4 market and competition and so forth; that is one of the things that seems to me to be the issue and I'd like that issue to be briefed in a post-trial memorandum along with whatever else you have in mind. The plaintiff has indicated to me that they will deal more extensively with the question of the jurisdiction since, obviously, that is a critical question here which we will have to consider but-- with that in mind, then I don't mean to say that I'm restricting you to those things -- I am merely trying to point out the things that to me seem critical.

There may be other things after I read the

transcript that I will find to be important, but those are the things that strike me right now.

What is the time element, Mr. Winton, Mr. Harris and Mr. Copeland, to the extent that you need in order to file these briefs? How much time do you think you want?

MR. WINTON: We would like about two weeks.

THE COURT: The transcript will be ready Monday. Would you like about two weeks from Monday?

MR. WINTON: I think if we take two weeks from today because we pretty much know what is in the transcript.

MR. HARRIS: Are you envisioning simultaneous transfers or sort of a sequence?

THE COURT: Do you want them simultaneously? Whatever time we agree upon for filing briefs they will be exchanged the same day and then each of you -- well, not each but you and Mr. Copeland on the one hand and Mr. Winton on the other will be given about a week thereafter to answer anything you think and that will be done simultaneously, so we will set two dates for exchange of briefs.

MR. COPELAND: Of course, whatever your Honor would prefer, certainly I would abide with it. I had

hoped for a little more time. I expect to be out of the country the entire week of February 12th.

THE COURT: Well, as I understand it, the Secretary entered an agreement and I don't think the question of time is critical to the plaintiffs in the action and I am not going to pressure that far. You can go out of the country but as far as I am concerned the point is when will it be convenient for you and Mr. Harris, that is what I really want to know. I will set a date convenient to everybody.

MR. COPELAND: To be perfectly honest, your Honor, I had hoped for at least a month. If that is too long, whatever the court feels would be appropriate, I am willing to abide by it.

THE COURT: Mr. Harris, I am trying to get a suggestion from you.

MR. HARRIS: I am looking at my calendar, your Honor. We were thinking of 30 days because I am in the middle of another trial which has been going on for a week and will be going on for another week so that would be the 26th.

THE COURT: Today is the 24th. You are thinking about something like the 20th of February? That is time enough, Mr. Copeland?

MR. COPELAND: Yes, your Honor. May I make a suggestion as to a date so that we would have a weekend in there; may I suggest Monday, the 26th? Would that be acceptable to everyone?

THE COURT: That is agreeable to me.

MR. HARRIS: Fine.

THE COURT: All right; briefs in chief on the 26th for all parties to be served and then on March the 5th, I will give you until March the 5th to file the briefs.

MR. HARRIS: Thank you, your Honor.

MR. WINTON: Your Honor, do you want to hear oral argument then or what is your preference?

THE COURT: I don't really think so. I will tell you what to do; it might be helpful but my thinking right now is no, but I would not foreclose that possibility; those of you who feel, if you feel that oral argument would be helpful to your position then indicate it to me in the briefs you file and if I feel it is going to be helpful I will do it; but I had in mind, as a matter of fact, is for you to gear -- oh, I forgot -- included in the briefs I want proposed findings of the facts and conclusions in addition to the briefs themselves, but I wanted the briefs, of course geared to the transcripts and to the exhibits and it would appear to

was that, oral argument may not be helpful, but I am willing to, if it would be helpful, then say so in your briefs and I will consider it.

MR. WINTON: Could we just say one word now and then not have any argument? Just to express our view of what we think the issues -- it will only take three minutes.

THE COURT: I think I have heard that and I have read your papers; very well.

MR. WINTON: I wanted to add one thing, if I can.

THE COURT: All right.

MR. WINTON: I think the central issue is discrimination and if we win on this, the other issues which we briefed are not important, but if we don't succeed in persuading your Honor on that, then there are the subsidiary issues.

THE COURT: I am perfectly aware of that, Mr. Winton, and I indicated to you I was not restricting you to that at all. It seems to me you made very clear what you regard as the issues in this case. I think sometimes it is kind of difficult, but I read.

All right. I think that is all. Thank you very much.

Plaintiff's Trial Exhibit 1 -
Stipulation of Certain Facts

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

DAIRYLEA COOPERATIVE, INC.,

Plaintiff,

-against-

EARL L. BUTZ, SECRETARY OF AGRICULTURE OF THE UNITED STATES,

Defendant,

PENNMARVA DAIRYMEN'S COOPERATIVE FEDERATION, INC.,

Intervening Defendant.

1972 Civ. No. 4653

R.L.C.

STIPULATION OF CERTAIN FACTS

----------x

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the parties to this action, that the statements of fact contained herein are true for the purposes of this action, it being understood however that no party waives the right to any objection to the admissibility at the trial of this action of any or all of such statements of fact or to offer further evidence.

1. Plaintiff is a cooperative association of dairy farmers duly organized under the laws of the State of New York with its principal place of business in the County and City of New York.

2. Plaintiff has approximately 10,000 producer members. Approximately 890 of its members are regulated under Order 4, which is approximately 10% of the total number of producers so regulated. Approximately 4,900 of its members

are regulated under Order 2, which is approximately 23% of the producers so regulated. Plaintiff's other members ship to other markets in the Northeast.

3. Plaintiff is a qualified cooperative under both Orders 2 and 4. All of the milk which is the subject of this action is pooled under the provisions of Order 4 and is subject to the provisions of Order 4. Plaintiff is authorized to receive from the Order 4 pool the sum of the payments which would be due its individual producer members in respect of the milk delivered by them under Order 4.

4. Attached hereto as Schedule 1 is a form of contract which is representative in the first eight numbered paragraphs of the contract between the plaintiff and its producer members subject to minor individual variations not pertinent to this action.

5. Plaintiff receives payment under Order 4 for all of the milk marketed by it for its producer members including the milk which is the subject of this action. In accordance with its contract with its producer members, out of the proceeds of all the milk and milk products marketed by plaintiff for its producer members, plaintiff pays to each of the farmers whose milk is involved herein an amount equal to the Order 2 blend price subject to differentials established by its Board of Directors. Among the differentials established by the Board of Directors was a deduction representing in part

the cost of the operations of the cooperative. Any recovery in this action, if so applied, would reduce the deduction from the milk checks of all plaintiff's producer members.

6. Historically, milk sold for fluid consumption has commanded a higher price in the market than milk of the same quality used for the production of dairy products. Production is lowest in the fall and winter (the short season), and greatest in the spring (the flush season). The dairy herds necessary to satisfy milk needs in the short season, produce surplus milk in the rest of the year. In the absence of federal regulation, chaotic marketing conditions and destructive competition amongst producers resulted with each producer cutting his price to economically low levels in an effort to obtain the fluid milk market.

7. The essence of the statutory scheme adopted by the Congress in The Agricultural Marketing Agreement Act of 1937 (the Marketing Act) to deal with this problem is to provide for the payment of a uniform price to all dairy farmers (producers) whose milk is sold to handlers regardless of the use (i.e. as fluid milk or in manufactured dairy products) to which it is put by the particular handler to whom they sell, subject only to specifically enumerated adjustments relating to volume, market and production differentials, the grade of milk, the locations at which de-

livery of the milk is made to the handler, and specified seasonal adjustments.

8. The statutory scheme envisions the promulgation of regulations --called "Marketing Orders" - by the Secretary of Agriculture of the United States. The Secretary has promulgated orders governing the marketing of milk in various geographical areas of the United States. Each order covers a particular marketing area.

9. Order 4 (a copy of which as currently in effect is being submitted to the Court) promulgated in 1970, covers marketing in the District of Columbia, the State of Delaware and certain counties in the States of Maryland, Virginia, Pennsylvania and Southern New Jersey - basically Philadelphia, Baltimore and Washington, D.C. Order 2 covers marketing in New York and Northern New Jersey. Plaintiff has for some time been marketing under Orders 2 and 4 milk produced by its members.

10. The total number of pounds of milk marketed in 1972 under Order 4 was 4.5 billion pounds, and under Order 2 was about 10 billion pounds.

11. The basic features of the pricing structure under both Orders 4 and 2 are as follows: milk sold by all producers to handlers regulated by the particular Order is divided into classes based on use. Milk sold for fluid use

carries the highest price -- Class I; milk used to manufacture dairy products, is assigned a lower price - Class II. These class prices are announced each month by a market administrator who is appointed by defendant to administer the Order. There is a separate market administrator for each of the Orders.

12. Under each Order the total amount of milk used monthly in each class by all handlers under the order is determined, and then multiplied by the applicable class prices. The total is then divided by the total number of pounds of milk in both classes. The result, called a uniform price, is subject to adjustments one of which is a seasonal adjustment which differs between Orders 2 and 4.

13. Each producer or if he is a member of a qualified cooperative, his cooperative receives the order price as so adjusted for the pounds of milk delivered by him to handlers under the respective order, regardless of the use made of the milk by the particular handler to whom the producer sold his milk. The handler however pays for the milk delivered to him based on his class use; and any difference between the prices so payable and the uniform price paid to the producers delivering milk to him, is adjusted through a fund - the Producer Settlement Fund - maintained under the Particular Order.

Plaintiff's Trial Exhibit 1 -
Stipulation of Certain Facts

14. Order 4 provides for a Base-Excess plan in Sections 1004.90-1004.96 which determines the actual amounts payable to the individual producer (or his cooperative). These provisions are the subject of this action.

15. Under the Base-Excess plan of Order 4 the total number of pounds of milk delivered by a producer is divided into two categories, namely "base" milk on the one hand and "excess" milk on the other. For base milk, the producer (or his cooperative) receives a higher price; for excess milk, a lower price.

16. The market administrator for Order 4 is required to compute the base for each producer pursuant to the applicable provisions of Order 4.

17. The prices for base and excess milk are arrived at as follows:

Excess milk is assigned to Class II and priced at the lower Class II value. Base milk receives a higher price determined by subtracting from the total value of all the milk in the pool (both Class I and Class II milk), the amount of excess milk at the Class II price. The price for base milk is thus a blend of all of Class I and only so much of Class II milk as is not assigned to excess milk. Attached hereto as Schedule 2 is a schedule showing the uniform base and excess prices and the weighted average

blend price under Order 4 and the uniform prices under Order 2 for 3.5% butterfat milk for each of the months January 1971 through December 31, 1972. The prices under Order 4 are f.o.b. plants located within 55 miles of Philadelphia or within 75 miles of Washington, D.C. or Baltimore. The prices under Order 2 are for the 201-210 mile zone. The base price is, as is there shown, much higher in every month than the excess price.

18. Plaintiff has for many years supplied most of the milk requirements of Johanna Farms, Inc., a distributing handler located in Flemington, New Jersey, who for some years has been and is subject to regulation under Order 4. The business of said handler has for some years now been growing, and as a result, so did its milk requirements.

In the months of May, June and October 1972, plaintiff undertook to fulfill the increased requirements by shifting additional milk produced by its members previously regulated and priced under Order 2 in such quantities as resulted in such milk becoming subject to pricing under Order 4.

The milk of these producers thereby became subject to the base and excess plan of Order 4; and having made no deliveries for which base period credit is allowed under Section 1004.92 of Order 4 during the prior August through December 1971 period, these producers were accorded a percentage

base under Section 1004.92(e), instead of a base determined upon their own production.

19. There will be annexed hereto as Schedule 2 a schedule (to be added by supplemental stipulation) showing plaintiff's members who shifted into Order 4 in May, June and October 1972 and showing, for each such producer, his deliveries during the period of August-December 1971, what his base would have been if based upon those deliveries, and also showing his deliveries during each of the months May-November, 1972, the amounts received in respect of such deliveries upon the basis of the order bases assigned pursuant to Section 1004.92(e), the amounts which would have been received if his production base (based on his prior August-December 1971 deliveries under Order 2) had been applied, and the difference between what was received by them under the assigned base and what would have been received under their production bases.

All such data shall be subject to audit by the Market Administrator of Order 4; but this shall be without prejudice to a determination by the Court as to the date from which interest, if any, shall be payable.

Plaintiff's Trial Exhibit 1 -
Stipulation of Certain Facts

20. The provisions of Order No. 4 were promulgated by the Secretary through a rule making proceeding which included:

(a) Notice of Hearing published July 9, 1969.

(b) Public Hearing held in Baltimore August 4 and 15, 1969, and at King of Prussia, Pa. on August 18-22, 1969, and at Friendship, Md. on October 30, 1969.

(c) Receipt of Briefs filed by industry members.

(d) Issuance of a Recommended Decision by the Secretary published in Fed. Reg. March 16, 1970.

(e) Receipt of exceptions to the recommended decision by industry members.

(f) Issuance of a final decision published in Fed. Reg. May 22, 1970 (35 F.R. 7924).

21. A certified copy of this rule making proceeding including a transcript of testimony and copies of exhibits received has been filed with the clerk of this court.

22. A copy of Federal Order No. 4 in effect March 1, 1972 is attached hereto as Schedule 3.

23. A copy of Federal Order No. 2 in effect January 1, 1972 is attached hereto as Schedule 4.

Plaintiff's Trial Exhibit 1 -
Stipulation of Certain Facts

24. Annexed hereto as Schedule 5 is a true copy of a speech delivered by Mr. Herbert Forest, who at the time of said speech held the office described in said Schedule.

BOTEIN, HAYS, SKLAR & HERZBERG

By Sidney C. Winton
Attorneys for Plaintiff
DAIRYLEA COOPERATIVE, INC.

WHITNEY NORTH SEYMOUR
U.S. Attorney for the Southern
District of New York

By [signature]
Attorney for Defendant
EARL L. BUTZ

SIMPSON THATCHER & BARTLETT

By [signature]
Attorneys for Intervening
Defendant
PENNMARVA DAIRYMEN'S COOPERATIVE
FEDERATION, INC.

Plaintiff's Trial Exhibit 2 - "Schedule 2, Part I" Showing Comparative Prices Under Order 4 and Order 2

SCHEDULE 2

PART I (Re: 917)

	ORDER 4			ORDER 2
	Base Price	Excess Price	Weighted Av. or Blend	Uniform Price
1971		F.O.B. Market		201-210 Mile Zone
Jan.			$6.60	$6.07
Feb.			$6.61	$6.04
Mar.	$6.84	$4.65	$6.64	$5.86
Apr.	$6.81	$4.69	$6.59	$5.65
May	$6.65	$4.67	$6.41	$5.47
June	$6.59	$4.67	$6.39	$5.38
July	$6.69	$4.82	$6.52	$5.92
Aug.	$6.63	$4.89	$6.46	$6.27
Sept.	$6.83	$4.91	$6.64	$6.44
Oct.	$6.85	$4.90	$6.66	$6.44
Nov.	$6.93	$4.92	$6.74	$6.43
Dec.	$6.96	$5.01	$6.75	$6.24
		Simple Average	$6.584	$6.018
1972				
Jan.	$6.96	$4.98	$6.71	$6.17
Feb.	$7.05	$4.98	$6.79	$6.21
Mar.	$6.95	$4.91	$6.77	$5.89
Apr.	$6.75	$4.82	$6.57	$5.62
May	$6.81	$4.79	$6.56	$5.54
June	$6.77	$4.80	$6.59	$5.50
July	$6.73	$4.95	$6.61	$6.06
Aug.	$6.85	$5.11	$6.71	$6.64
Sept.	$7.05	$5.11	$6.90	$6.88
Oct.	$7.13	$5.21	$6.97	$6.97
Nov.	$7.25	$5.33	$7.08	$6.87
Dec.	$7.26	$5.44	$7.06	$6.61
Simple Average	$6.963	$5.036	$6.777	$6.247

Source: Market Administrator's Price Announcements

Plaintiff's Trial Exhibit 4 - Monthly Summary of Losses (May-November 1972)

Summary of Losses By Months
May through November only *

May, 1972	$1,235.21	Salem
June	$3,601.35	Salem
July	$2,624.02	Salem
August	$ 941.56	Salem
September	$2,059.67	Salem
October	$6,848.46	Salem 006
	10,294.68	Salem 007
	35,445.89	Honeydale
	$52,589.03	
November	$6,220.09	Salem 006
	9,820.18	Salem 007
	33,489.11	Honeydale
	$49,529.38	
Total, May-November	$112,580.22	

* Additional losses for Dec. '72 and Jan.-Feb. '73 are estimated to exceed $50,000 per month because of reduction of assigned base from 70% to 60% making aggregate losses for May, 1972 - February, 1973 in excess of $262,500.

Plaintiff's Trial Exhibit 5 - Order 4 Report for October 1972 for Honesdale, Pennsylvania Plant

NOV 10 1972

FORM DA-6 (8-70)

UNITED STATES DEPARTMENT OF AGRICULTURE
Agricultural Marketing Service
Dairy Division

FORM APPROVED BUDGET BUREAU NO. 43-R3100

MIDDLE ATLANTIC MILK MARKETING AREA
Federal Order #4
REPORT OF RECEIPTS AND UTILIZATION

handler: Dairylea Cooperative, Inc.
mailing address: 1250 Broadway, New York, NY. 10001

A-1
2

Delivery Month OCT 1972 19

Plant Location Honesdale Pa.
133-1-140

RECEIPTS

Schedule A. RECEIPTS OF PRODUCER MILK

No. Lines	FROM	NO. OF PRODUCERS	BASE POUNDS	PRODUCT POUNDS	BUTTERFAT POUNDS	SKIM POUNDS
1	Members [illegible] Coop. Assn.	302	Pt Exempt	9703543	346205	9337338
2	Members _____ Coop. Assn.		Available			
3	Nonmember producers		Will Ship			
4	Own Farm Production		on Base			
5	TOTAL PRODUCER RECEIPTS	302	6792480	9703543	346205	9337338

Schedule B. RECEIPTS OF FLUID MILK PRODUCTS FROM OTHER POOL HANDLERS (Classification by H.A.)

	NAME AND LOCATION OF POOL PLANT	PAY. OR BULK	CLASS REQ.	TOTAL PRODUCT LBS.	TOTAL B. F. LBS.	CLASS I PRODUCT LBS	CLASS I B. F. LBS.	CLASS II PRODUCT LBS	CLASS II B. F. LBS.
6									
7									
8									
9									
10									
11	Total Other Pool Plants								
	Cooperative Associations: Acting as handler:								
12									
13									
14									
15	Total Cooperative Associations								
16	TOTAL (Add Lines 11 and 15)								
17	Butterfat Pounds								
18	Skim Pounds								

Schedule C. RECEIPTS FROM OTHER SOURCES

	TYPE*	NAME AND LOCATION OF PLANT	CLASS II REQUESTED	PRODUCT	PRODUCT POUNDS	BUTTERFAT POUNDS	SKIM POUNDS
19							
20							
21							
22							
23							
24							
25							
26							
27							
28							
29							
30							
31							
32	TOTAL OTHER SOURCE RECEIPTS						
33	Beginning Inventory of Packaged Fluid Milk Products						
34	Beginning Inventory of Bulk Fluid Milk Products				-0-	-0-	-0-
35	TOTAL TO ACCOUNT FOR, Add lines 5, 16, 32, 33, 34				9703543	346205	9337338

* TYPES OF OTHER SOURCE RECEIPTS

(a) Packaged Certified Milk
(b) Other Order Plants—Packaged
(c) Cream receipts from any source
(d) Cream in Opening Inventory
(e) From other than a fluid milk product at skim equivalent (including receipts for which disposition is not established)
(f) Dairy farmers for other markets
(g) Unidentified sources
(h) Producer handlers under any order
(i) Governmental Agency
(j) Filled milk-unregulated supply plants
(k) Filled milk-other order plant (individual handler pool)
(l) Unregulated supply plants (bulk)
(m) Unregulated supply plants (packaged)
(n) Other order plants classified & priced (bulk)
(o) Other order plants not classified & priced (bulk)

I declare under the penalties provided by law, that this report (including schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct and complete report. I also certify that I am authorized to sign this report.

DAIRYLEA COOPERATIVE INC.
Name of Handler

[illegible]
(Person Authorized to Sign Handler)

THIS REPORT, PROPERLY FILLED OUT, MUST BE SUBMITTED TO THE MARKET ADMINISTRATOR OR A DESIGNATED AGENCY OF THE U.S. DEPARTMENT OF AGRICULTURE NOT LATER THAN THE 10TH DAY AFTER THE END OF THE MONTH FOLLOWING THAT FOR WHICH

Plaintiff's Trial Exhibit 5 - Order 4 Report for October 1972 for Honesdale, Pennsylvania Plant

Plant Honesdale, Pa. Month Oct. 1972

UTILIZATION

Schedule D. ROUTE DISPOSITION	In Marketing Area Product Lbs.	In Marketing Area Butterfat Lbs.	In Area of Order— Product Lbs.	In Area of Order— Butterfat Lbs.	Unregulated Area Product Lbs.	Unregulated Area Butterfat Lbs.	TOTAL Product Lbs.	TOTAL Butterfat Lbs.
Certified Milk								
Whole Milk								
Chocolate Milk								
Chocolate Drink								
Buttermilk								
Skim								
Skim Fortified								
2% Low Fat								
Plain or flavored milk drink								
Filled milk (Skim)								
Mixtures less than 10%								
Total Route Disposition								
Closing Inventory of Packaged Fluid Milk Products								
Total								

Schedule E. TRANSFERS AND DIVERSIONS TO OTHER PLANTS (Classification by M.A.)

	Class II Rec	Product	Pkg. Desc.	I D	TOTAL Product Lbs.	TOTAL B. F. Lbs.	CLASS I Product Lbs.	CLASS I B. F. Lbs.	CLASS II Product Lbs.	CLASS II B. F. Lbs.
Pool Plants:										
Honesdale, Pa.		Milk	B	T	8373240	311193	8373240	311193		
Total					8373240	311193	8373240	311193		
Normal plants:										
Lehighton, Pa.	✓	Milk	B	T	683420	25367			683420	25367
Bell "Dairy"	✓	"	B	T	148440	5510			148440	5510
Wilkes-Barre, Pa.	✓	"	B	T	142640	5500	142640	5500		
Bethlehem, Pa.	✓	"	B	T	49200	1820			49200	1820
PG&E Waterville, Inc.	✓	"	B	T	142800	5514			142800	5514
Total					1176700	43711	142640	5500	1176700	43711
Total Schedule E					9550240	354904	8515880	316693	1176700	43711

Schedule F. OTHER UTILIZATION AND DISPOSITION	In Marketing Area Product Lbs.	In Marketing Area Butterfat Lbs.	Area of Order— Product Lbs.	Area of Order— Butterfat Lbs.	Unregulated Area Product Lbs.	Unregulated Area Butterfat Lbs.	TOTAL Product Lbs.	TOTAL Butterfat Lbs.
Cream (10.18%)								
Cream (18.27%)								
Cream (Over 27%)								
Sour Cream								
Aerated Cream								
Cream transfers to other plants								
Cream on hand end of month								
Livestock Feed								
Dumped								
Used to Produce:								
Products containing 6% or more non-milk fat (skim milk)								
Yogurt								
Cottage Cheese								
Ice Cream Mix								
Condensed								
Skim or Whole Milk Powder								
Eggnog								
Butter								
Class II portion fluid skim equivalent								
Bulk Fluid Milk Products to Plt. of non-milk Products								
Closing Inventory of bulk fluid milk products							54400	2053
Total Schedule F							54400	2053

Schedule G - TOTAL SHRINKAGE OR (Overage)	Product Lbs.	Butterfat Lbs.	Skim
Total Schedule D	9551940	356970	9172058
Total Schedule E	54400	2053	52347
Total Schedule F	26040	1234	24806
Sub-Total	9632380	360257	9272123
Shrinkage or (overage)	97183	3948	93235
Total to Account for - (Lines 1 - Line 33)	9729563	364205	9365358

Plaintiff's Trial Exhibit 6 - Net Pool Obligations for October 1972 for Honesdale, Pennsylvania Plant

Dairylea Cooperative, Inc.
1250 Broadway
New York, NY 10001

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OCT 1972

Honesdale Pa.
135-140

POOL OBLIGATIONS

PRODUCER SETTLEMENT FUND

	HANDLER'S POOL OBLIGATION	PRODUCT POUNDS	PRICE PER CWT.	VALUE
CHARGES:				
1	Class I Producer Milk (Line 32, PC-2)	8,568,273	7.85	672,610.92
2	Class I Cooperative Milk §1004.9(c), HR-4, Sch. B, Line 15			
3	Less Location Differential on Producer & Coop. milk, Class I	8,567,273	.21	(17,995.41
4	Class II producer milk (Line 32, PC-2)	1,135,251	5.27	59,814.20
5	Class II Cooperative Milk (§ 1004.9(c), HR-4, Sch. B, Line 15			
6	Class I Overage (At test)			
7	Class II Overage (At test)			
8	Direct Delivery Differential - Overage			
9	Less: Location Differential - Class I overage			(
10	Reclassification of Bulk Opening Inventory to Class I			
11	Revaluation of Packaged opening inventory (plus or minus)	—	—	—
12	Other Source Milk maintained Class I, § 1004.60(d)			
13	Other Source Milk maintained Class I § 1004.60(e)			
14	Net Pool Obligation			$ 714,931.71
CREDITS:				
15	Producer milk base at Uniform Price for base milk	6,797,480	7.13	484,303.72
16	Producer milk excess at Uniform Price for excess milk	2,911,063	5.21	151,627.27
17	Cooperative milk base at Uniform Price for base milk			
18	Cooperative milk-excess at Uniform Price for excess milk			
19	Less Location differentials Producer and Cooperative milk (Lines 15 and 17)	6,797,480	.21	(14,264.21
20	Other source milk - Line 13 x weighted average price plus 5¢			
21	Less Location differential on Line 20			(
22	Total Lines 15 thru 21			621,705.49
23	Net Producer Settlement Fund Line 14 less 22	charge ☒ credit ☐		92,625.72
24				
25	Audit Adjustments:	charge ☐ credit ☐		
26	Total Producer Settlement Fund: Payment due on or before the 15th day of the month			$ 92,625.72
	Payment by Market Administrator will be made on or before the 17th day of the month			

DEDUCTION FOR MARKETING SERVICES

27	Non-member producer receipts, Schedule A - Line 3			
28	Audit Adjustments:	charge ☐ credit ☐		None
29	Total Marketing Services Fund: Payment due on or before the 20th day of the month			

ASSESSMENT FOR ORDER ADMINISTRATION

30	Producer Receipts, Schedule A-Line 5 Except a Cooperative under 1004.9(c)	9,703,543
31	Less: Bulk transfers to Pool Plants by a Cooperative operating a pool plant	(8,373,261
32	Receipts from Cooperative - § 1004.9(c) - Schedule B, Line 15	
33	Bulk receipts from a pool plant operated by a Cooperative Association	
34	Other Source milk maintained Class I - Lines 12 and 13	
35	Total receipts subject to assessment	1,330,283
36	Assessment rate per hundredweight	.025
37	Assessment (Line 35 x Line 36)	332.57
38		
39	Audit Adjustments: charge ☐ credit ☐	
40	Total Administrative Fund: Payment due on or before the 20th day of the month	$ 332.57

41	Total due Market Administrator: Exclusive of any credit due from Market Administrator for producer settlement fund on Line 26	$ 92,958.29

Please make check payable to:
FEDERAL MILK MARKET ADMINISTRATOR

Mail to:
Federal Milk Market Administrator
300 North Lee Street, Suite 320
Alexandria, Virginia 22314

4183

Plaintiff's Trial Exhibit 6 - Net Pool Obligations for October 1972 for Honesdale, Pennsylvania Plant

PC-2 (4-72)

CLASSIFICATION OF PRODUCER MILK

			CLASS I POUNDS		CLASS II POUNDS	
			Butterfat	Skim	Butterfat	Skim
1	TOTAL UTILIZATION (PC-1 Lines 2 + 14 & 3 + 13)		323,941.	8,244,351.	42,264.	1,092,927.
	SUBTRACT HR-4 Schedule C Type					
2	Receipts from Other Order Plants Classified & Priced Duplicated by similar shipments to same plant					
3	Shrinkage Assigned Class II (pc-1 - Line 12)		////////////	////////////	2,960.	48,791.
4	Receipts Packaged Certified Milk & Exempt Milk	a			////////////	////////////
5	Receipts Pkg. Fluid Milk Other Orders (Except Type k) Lesser of 2% or Balance Remaining	b	////////////	////////////		
6	Remainder not deducted on Line 5	b			////////////	////////////
7	Beginning Inventory Pkg. Fluid Milk Products (HR-4, Page 1, Line 33)				////////////	////////////
8	Cream Receipts & Opening Inventory and Receipts other than a fluid milk product	c, d e				
9	Receipts Dairy Farmers Other Markets and from Unidentified Sources	f g				
10	Receipts from Producer handlers under any order	h				
11	Receipts Governmental Agency as handler (other than exempt milk)	i				
12	Receipts Reconstituted Skim Milk in Filled Milk from Unregulated Plants	j				
13	Receipts Reconstituted Skim Milk in Filled Milk from Other Order Plants (individual handler pool)	k				
14	Receipts from unregulated supply plants Bulk or Pkg. (Class II requested)	l, m	////////////	////////////		
15	Remainder		323,941.	8,244,351.	40,264.	1,044,136.
16	Receipts from Unregulated Supply plants (PC-3 Line 20)		////////////	////////////		
17	If deduction on Line 16 exceeded Class II on Line 15 Increase Class II and decrease Class I by a like amount 1/					
18	Receipts other orders (classified & priced)-bulk-Class II requested-in excess of similar movement to such plant	n	////////////	////////////		
19	Beginning Inventory Bulk Fluid milk products (HR-4 - Page 1, Line 34)					
20	ADD shrinkage deducted on line 3 above		////////////	////////////	2,960.	48,791.
21	Remainder (percentages) % % % %		323,941.	8,244,351.	43,224.	1,092,927.
22	Receipts unregulated plants & other order plants not classified & priced not deducted on Lines 14 or 16 above	l m, o				
23	If deduction on Line 22 exceeds the remainder on Line 21 increase such Class and decrease the other by like amount 1/					
24	Remainder (percentages) % % % %		323,941.	8,244,351.	42,264.	1,092,927.
25	Utilization Percentage % % % %		////////////	////////////	////////////	////////////
26	Receipts other orders classified & priced not deducted on Line 18 above. (higher % of Line 24 or 25)	n				
27	If deduction on Line 26 exceeds Class II on Line 24 increase Class II and decrease Class I by a like amount 1/					
28	Receipts other pool plants (HR-4, page 1, Line 11)					
29	Receipts Cooperatives as handler, (HR-4, page 1, Line 15)					
30	Overage					
31	PRODUCER RECEIPTS ALLOCATED		323,941.	8,244,351.	42,264.	1,092,927.
32	PRODUCT POUNDS		8,568,292.		1,135,191.	
33	BUTTERFAT TEST		3.78071		3.72313	
34	TOTAL PRODUCER MILK - Product Pounds-Butterfat Pounds		9,703,543.		211,205.	

1/ Reverse on the nearest other pool plant of the handler.

Handler Dairylea - Honesdale Plt. Delivery month OCT 1972 19

A 317

Plaintiff's Trial Exhibit 6 - Net Pool Obligations for October 1972 for Honesdale, Pennsylvania Plant

PC-1
(4-72)

Federal Order No. 4

SHRINKAGE ALLOCATION AND COMPUTATION

		Product Pounds	Butterfat Pounds	Skim Pounds
1	Total To Account For (HR-4, Page 1, Line 35)	9,713,643.	314,315.	9,337,338.
2	Class I Utilization (HR-4 - Schedules D and E)	8,531,900.	311,442.	8,205,207.
3	Class II Utilization (HR-4 - Schedules E and F)	1,084,460.	40,314.	1,044,196.
4	Total Utilization (Lines 2 and 3)	9,606,360.	351,757.	9,249,403.
5	Overage (Line 4 less Line 1)	— .	— .	— .
6	Shrinkage (Line 1 less Line 4)	97,183.	9,248.	87,935.

OTHER SOURCE SHRINKAGE EXCLUSIVE OF THAT SPECIFIED UNDER § 1004.40(b) (5)

7	Total - HR-R - Schedule C (Line 32) less Lines 19, 20 and 21 below	—o— .	—o— .
8	Total - HR-4 - Schedule A - Line 5 (Less Diverted Milk), Schedule B - Line 16 (Less Packaged) and Schedule C - Line 32	314,315.	9,337,338.
9	Line 7 divided by Line 8	—o— %	—o— %

SHRINKAGE CLASSIFICATION

10	Class II Shrinkage To Other Source (% on Line 9 x Line 6)	(—o—)	(—o—)
11	Net Shrinkage To Other Receipts (Line 6 less Line 10)	9,248.	87,935.
12	Class II Shrinkage To Other Receipts * (Lesser of Line 11 or Line 20)	2,000.	48,791.
13	Total Class II Shrinkage (Add Line 10 and Line 12)	2,000.	48,791.
14	Class I Shrinkage To Other Receipts (Line 6 less Line 13)	7,248.	39,144.

MAXIMUM CLASS II SHRINKAGE PURSUANT TO § 1004.40(b) (5)

15	HR-4 - Schedule A Line 5 (Less Diverted Milk)	314,315.	9,337,338.
16	Plus Shrinkage (2% of Line 15 above)	7,324.	186,747.
17	HR-R - Schedule B, Line 15		
18	HR-4 - Schedule B, Lines 6 through 10 (Bulk Tank Lots)		
19	HR-4 - Schedule C, Type (n) (Bulk) (Class II Not Requested)		
20	HR-4 - Schedule C, Type (f)		
21	HR-4 - Schedule C, Type (1) (Bulk) (Class II Not Requested)		
22	Total (Lines 17 through 21)	—o— .	—o— .
23	Plus Shrinkage (1.5% of Line 22)	—o— .	—o— .
24	HR-4 Schedule E (BULK TANK LOTS TRANSFERRED)	321,904.	9,197,056.
25	Less Shrinkage (1.5% of Line 24 above)	(5,324.)	(137,956.)
26	Class II Shrinkage To Other Receipts (Add Lines 16, 23, Less Line 25)	2,000.	48,791.

* Not to exceed 0.5% of farm weights of producer milk received by a cooperative association as a handler pursuant to § 1004.9(c)

Handler Dairylea - Honesdale, Pa. Delivery Period OCT 1972 19

A 316

Plaintiff's Trial Exhibit 7 - Order 4 Report for November 1972 for Honesdale, Pennsylvania Plant

12 Ba-6
-203

UNITED STATES DEPARTMENT OF AGRICULTURE
Agricultural Marketing Service
Dairy Division

DEC 11 1972
FORM APPROVED
BUDGET BUREAU
NO. 40-R3160

MIDDLE ATLANTIC MILK MARKETING AREA
Federal Order #4
REPORT OF RECEIPTS AND UTILIZATION

Dairylea Cooperative, Inc. A-1
1250 Broadway 2
New York, NY 10001

3.625

Delivery Month NOV 1972

Plant Location Honesdale, Pa.
130-1-140

RECEIPTS

Schedule A. RECEIPTS OF PRODUCER MILK

Line	FROM	NO. OF PRODUCERS	BASE POUNDS	PRODUCT POUNDS	BUTTERFAT POUNDS	SKIM POUNDS
1	Members DAIRYLEA COOPERATIVE INC. Coop. Assn.	303	Not yet	9107677	342754	8764923
2	Members _____ Coop. Assn.		available			
3	Nonmember producers		will show			
4	Own Farm Production		on later			
5	TOTAL PRODUCER RECEIPTS	303	6375374	9107677	342754	8764923

Schedule B. RECEIPTS OF FLUID MILK PRODUCTS FROM OTHER POOL HANDLERS (Classification by M.A.)

	NAME AND LOCATION OF POOL PLANT	PKG. OR BULK	CLASS REQ.	TOTAL		CLASS I		CLASS II	
				PRODUCT LBS.	B. F. LBS.	PRODUCT LBS.	B. F. LBS.	PRODUCT LBS.	B. F. LBS.
6									
7									
8									
9									
10									
11	Total Other Pool Plants								
	Cooperative Associations: Acting as handler:								
12									
13									
14									
15	Total Cooperative Associations								
16	TOTAL (Add Lines 11 and 15)								
17	Butterfat Pounds								
18	Skim Pounds								

Schedule C. RECEIPTS FROM OTHER SOURCES

	TYPE*	NAME AND LOCATION OF PLANT	CLASS II REQUESTED	PRODUCT	PRODUCT POUNDS	BUTTERFAT POUNDS	SKIM POUNDS
19							
20							
21							
22							
23							
24							
25							
26							
27							
28							
29							
30							
31							
32	TOTAL OTHER SOURCE RECEIPTS						
33	Beginning Inventory of Packaged Fluid Milk Products						
34	Beginning Inventory of Bulk Fluid Milk Products				54400	2053	52347
35	TOTAL TO ACCOUNT FOR, Add lines 5, 16, 32, 33, 34				9161477	344807	8817270

* TYPES OF OTHER SOURCE RECEIPTS

(a) Packaged Certified Milk
(b) Other Order Plants—Packaged
(c) Cream receipts from any source
(d) Cream in Opening Inventory
(e) From other than a fluid milk product at skim equivalent (including receipts for which disposition is not established)
(f) Dairy farmers for other markets
(g) Unidentified sources
(h) Producer handlers under any order
(i) Governmental Agency
(j) Filled milk-unregulated supply plants
(k) Filled milk-other order plant (individual handler pool)
(l) Unregulated supply plants (bulk)
(m) Unregulated supply plants (packaged)
(n) Other order plants classified & priced (bulk)
(o) Other order plants not classified & priced (bulk)

I declare under the penalties provided by law, that this report (including schedules and statements), has been examined by me and to the best of my knowledge and belief is a true, correct and complete report. I also certify that I am authorized to sign this report.

DAIRYLEA COOPERATIVE INC.
Name of Handler

Jean Kelly
(Person Authorized to Sign for Handler)
Accounting Department

THIS REPORT, PROPERLY FILLED OUT, MUST BE SUBMITTED TO THE MARKET ADMINISTRATOR ON OR BEFORE THE 8TH DAY AFTER THE END OF THE MONTH (SECTION 1004.30).

Plaintiff's Trial Exhibit 7 - Order 4 Report for Nov. 1972 for Honesdale, Pa. Plant

Shipper [illegible] Plant Honesdale, Pa. Month [illegible] 19

UTILIZATION

Schedule D. ROUTE DISPOSITION	In Marketing Area Product Lbs.	In Marketing Area Butterfat Lbs.	In Area of Order— Product Lbs.	In Area of Order— Butterfat Lbs.	Unregulated Area Product Lbs.	Unregulated Area Butterfat Lbs.	TOTAL Product Lbs.	TOTAL Butterfat Lbs.
Certified Milk								
Whole Milk								
Chocolate Milk								
Chocolate Drink								
Buttermilk								
Skim								
Skim Fortified								
2% Low Fat								
Plain or flavored milk drink								
Filled milk (Skim)								
Mixtures less than 10%								
Total Route Disposition								
Closing Inventory of Package Fluid Milk Products								
Total								

Schedule E. TRANSFERS AND DIVERSIONS TO OTHER PLANTS (Classification by M.A.)

	Class II Req	Product	Pkg. Milk	T D	TOTAL Product Lbs.	TOTAL B. F. Lbs.	CLASS I Product Lbs.	CLASS I B. F. Lbs.	CLASS II Product Lbs.	CLASS II B. F. Lbs.
Pool Plants:										
[illegible]		Milk	B	T	7723710	286914	7723710	286914		
Total					7723710.	286914.	7723710.	286914.		
Nonpool plants:										
[illegible]	✓	Milk	B	T	43260	1803	36031	1325	7229	268
[illegible]	✓	"	B	T	278700	10313	47322	1537	231378	8776
[illegible]		"	B	T	49650	1845	41340	1504	8310	341
[illegible]	✓	"	B	T	199260	7369	199260	6632	19920	737
							263673	9155	101587	3713
Total					1476220	54736.	1224418	44721.	1011589	37537
Total Schedule E					9199930	341650.	8948128	331635.	1011589	37537

Schedule F. OTHER UTILIZATION AND DISPOSITION	In Marketing Area Product Lbs.	In Marketing Area Butterfat Lbs.	Mktg. Area Order B— Product Lbs.	Mktg. Area Order B— Butterfat Lbs.	Unregulated Area Product Lbs.	Unregulated Area Butterfat Lbs.	Product Lbs.	Butterfat Lbs.
Cream (10.18%)								
Cream (18.27%)								
Cream (Over 27%)								
Sour Cream								
Aerated Cream								
Cream transfers to other plants								
Cream on hand end of month								
Livestock Feed								
Dumped								
Used to Produce:								
Products containing 6% or more non-milk fat (skim milk)								
Yogurt								
Cottage Cheese								
Ice Cream Mix								
Condensed								
Skim or Whole Milk Powder								
Eggnog								
Butter								
Class II portion fluid skim equivalent								
Bulk Fluid Milk Products to Mfg. of non milk Products								
Closing Inventory of bulk fluid milk products							60020	3011
Total Schedule F							60020.	3011.

Schedule G - TOTAL SHRINKAGE OR (Overage)	Product Lbs.	Butterfat Lbs.	Skim
Total Schedule D	—	—	—
Total Schedule E	9199930.	341650.	8715658.
Total Schedule F	60020.	3011.	22007.
Sub Total	9259950.	344793.	8737665.
Shrinkage or (overage)	82117.	2514.	74602.
Total to Account for - (page 1 - Line 35)	9177833.	342279.	8663063.

* Line 32 7,986,393. 295069. 1,013,547. 33313.

Plaintiff's Trial Exhibit 8 - Net Pool Obligations for November 1972 for Honesdale, Pennsylvania Plant

PC-5 (8-72)

Dairylea Cooperative, Inc.
1250 Broadway
New York, NY 10001

A-1
2

NOV 1972 19

Honesdale Pa.

130.1-140

POOL OBLIGATIONS

PRODUCER SETTLEMENT FUND

	HANDLER'S POOL OBLIGATION	PRODUCT POUNDS	PRICE PER CWT.	VALUE
CHARGES:				
1	Class I Producer Milk (Line 32, PC-2)	8,021,356.	7.89	632,082.15
2	Class I Cooperative Milk §1004.9(c), HR-4, Sch. B, Line 15			
3	Less Location Differential on Producer & Coop. milk, Class I	8,021,356.	.21	(16,844.85
4	Class II producer milk (Line 32, PC-2)	1,086,321.	5.38	58,445.07
5	Class II Cooperative Milk (§ 1004.9(c), HR-4, Sch. B, Line 15			
6	Class I Overage (At test)			
7	Class II Overage (At test)			
8	Direct Delivery Differential - Overage			
9	Less: Location Differential - Class I overage			(
10	Reclassification of Bulk Opening Inventory to Class I			
11	Revaluation of Packaged opening inventory (plus or minus)			—
12	Other Source Milk assigned Class I, § 1004.60(d)			
13	Other Source Milk assigned Class I § 1004.60(e)			
14	Net Pool Obligation			$ 673,682.07
CREDITS:				
15	Producer milk base at Uniform Price for base milk	6,375,374.	7.25.	462,214.62
16	Producer milk excess at Uniform Price for excess milk	2,[illegible]303.	5.33	145,631.75
17	Cooperative milk base at Uniform Price for base milk			
18	Cooperative milk excess at Uniform Price for excess milk			
19	Less Location differentials Producer and Cooperative milk (Lines 15 and 17)	6,375,374.	.21	(15,377.29
20	Other Source milk - Line 13 x weighted average price plus 5¢			
21	Less Location differential on Line 20			(
22	Total Lines 15 thru 21			$ 594,458.08
23	Net Producer Settlement Fund Line 14 less 22	charge ☑ credit ☐		79,223.99
24				
25	Audit Adjustments:	charge ☐ credit ☐		
26	Total Producer Settlement Fund: Payment due on or before the 15th day of the month			$ 79,223.99
	Payment by Market Administrator will be made on or before the 17th day of the month			

DEDUCTION FOR MARKETING SERVICES

27	Non-member producer receipts, Schedule A - Line 3		
28	Audit Adjustments: charge ☐ credit ☐		None
29	Total Marketing Services Fund: Payment due on or before the 20th day of the month		

ASSESSMENT FOR ORDER ADMINISTRATION

30	Producer Receipts, Schedule A-Line 5 Except a Cooperative under 1004.9(c)	9,107.77
31	Less: Bulk transfers to Pool Plants by a Cooperative operating a pool plant	(7,723.77)
32	Receipts from Cooperative - § 1004.9(c) - Schedule B, Line 15	
33	Bulk receipts from a pool plant operated by a Cooperative Association	
34	Other Source milk assigned Class I - Lines 12 and 13	
35	Total receipts subject to assessment	1,383,957
36	Assessment rate per hundredweight	.025
37	Assessment (Line 35 x Line 36)	$ 3,459.89
38		
39	Audit Adjustments: charge ☐ credit ☐	
40	Total Administrative Fund: Payment due on or before the 20th day of the month	$ [illegible].99

41	Total due Market Administrator: Exclusive of any credit due from Market Administrator for producer settlement fund on Line 26	$ 79,569.98

Please make check payable to:
FEDERAL MILK MARKET ADMINISTRATOR

Mail to:
Federal Milk Market Administrator
300 North Lee Street, Suite 320
Alexandria, Virginia 22314

P-1224

Plaintiff's Trial Exhibit 8 - Net Pool Obligations for November 1972 for Honesdale, Pennsylvania Plant

C-2
7-74)

CLASSIFICATION OF PRODUCER MILK

			CLASS I POUNDS		CLASS II POUNDS	
			Butterfat	Skim	Butterfat	Skim
1	TOTAL UTILIZATION (PC-1 Lines 2 + 14 & 3 + 13)		300,742	7,720,614	44,035	1,099,652
	SUBTRACT HR-4 Schedule C	Type				
2	Receipts from Other Order Plants Classified & Priced Duplicated by similar shipments to same plant					
3	Shrinkage Assigned Class II (pc-1 - Line 12)		//////////	//////////	1841	45313
4	Receipts Packaged Certified Milk & Exempt Milk	a			//////////	//////////
5	Receipts Pkg. Fluid Milk Other Orders (Except Type k) Lesser of 2% or Balance Remaining	b	//////////	//////////		
6	Remainder not deducted on Line 5	b			//////////	//////////
7	Beginning Inventory Pkg. Fluid Milk Products (HR-4, Page 1, Line 33)		—	—	//////////	//////////
8	Cream Receipts & Opening Inventory and Receipts other than a fluid milk product	c, d e			—	—
9	Receipts Dairy Farmers Other Markets and from Unidentified Sources	f g				
10	Receipts from Producer handlers under any order	h				
11	Receipts Governmental Agency as handler (other than exempt milk)	i				
12	Receipts Reconstituted Skim Milk in Filled Milk from Unregulated Plants	j				
13	Receipts Reconstituted Skim Milk in Filled Milk from Other Order Plants (individual handler pool)	k				
14	Receipts from unregulated supply plants Bulk or Pkg. (Class II requested)	l, m	//////////	//////////		
15	Remainder		300,742	7,720,614	42,224	1,051,343
16	Receipts from Unregulated Supply plants (PC-3 Line 20)		//////////	//////////		
17	If deduction on Line 16 exceeded Class II on Line 15 increase Class II and decrease Class I by a like amount 1/					
18	Receipts other orders (classified & priced)-bulk-Class II requested-in excess of similar movement to such plant	n	//////////	//////////		
19	Beginning Inventory Bulk Fluid milk products (HR-4 - Page 1, Line 34)				2,053	52,377
20	ADD shrinkage deducted on line 3 above		//////////	//////////	1841	45313
21	Remainder (percentages) % % % %		300,742	7,720,614	42,012	1,044,309
22	Receipts unregulated plants & other order plants not classified & priced, not deducted on Lines 14 or 16 above	l m, o				
23	If deduction on Line 22 exceeds the remainder on Line 21 increase such Class and decrease the other by like amount 1/					
24	Remainder (percentages) % % % %		300,742	7,720,614	42,012	1,044,309
25	Utilization Percentage % % % %		//////////	//////////	//////////	//////////
26	Receipts other orders classified & priced not deducted on Line 18 above. (higher % of Line 24 or 25)	n				
27	If deduction on Line 26 exceeds Class II on Line 24 increase Class II and decrease Class I by a like amount 1/					
28	Receipts other pool plants (HR-4, page 1, Line 11)					
29	Receipts Cooperatives as handler, (HR-4, page 1, Line 15)					
30	Overage					
31	PRODUCER RECEIPTS ALLOCATED		300,742	7,720,614	42,012	1,044,309
32	FIELDIST POUNDS		6,021,356		1,086,321	
33	BUTTERFAT TEST		3.74927		3.86727	
34	TOTAL PRODUCER MILK - Product Pounds-Butterfat Pounds		9,167,677		314,754	

1/ Reverse on the nearest other pool plant of the handler.

Handler Dairylea-Honesdale Plt Delivery month NOV 1972 19

Plaintiff's Trial Exhibit 8 - Net Pool Obligations for November 1972 for Honesdale, Pennsylvania Plant

C-4
-72)

Federal Order No. 4

SHRINKAGE ALLOCATION AND COMPUTATION

		Product Pounds	Butterfat Pounds	Skim Pounds
1	Total To Account For (HR-4, Page 1, Line 35)	9 162 077 ·	344 717 ·	8 717 270 ·
2	Class I Utilization (HR-4 - Schedules D and E)	7,982,333 ·	295,417 ·	7,691,324 ·
3	Class II Utilization (HR-4 - Schedules E and F)	1,093,567 ·	42,237 ·	1,051,343 ·
4	Total Utilization (Lines 2 and 3)	9,079,960 ·	337,293 ·	8,742,667 ·
5	Overage (Line 4 less Line 1)	—	—	—
6	Shrinkage (Line 1 less Line 4)	82,117 ·	7,514 ·	74,603 ·

OTHER SOURCE SHRINKAGE EXCLUSIVE OF THAT SPECIFIED UNDER §1004.40(b) (5)

7	Total - HR-R - Schedule C (Line 32) less Lines 19, 20 and 21 below	— ·	— ·
8	Total - HR-4 - Schedule A - Line 5 (Less Diverted Milk), Schedule B - Line 16 (Less Packaged) and Schedule C - Line 32	342,754 ·	8,764,933 ·
9	Line 7 divided by Line 8	— %	— %

SHRINKAGE CLASSIFICATION

10	Class II Shrinkage To Other Source (% on Line 9 x Line 6)	(—) ·	(—) ·
11	Net Shrinkage To Other Receipts (Line 6 less Line 10)	7,514 ·	74,603 ·
12	Class II Shrinkage To Other Receipts * (Lesser of Line 11 or Line 20)	1,841 ·	45,313 ·
13	Total Class II Shrinkage (Add Line 10 and Line 12)	1,841 ·	45,313 ·
14	Class I Shrinkage To Other Receipts (Line 6 less Line 13)	5,673 ·	29,290 ·

MAXIMUM CLASS II SHRINKAGE PURSUANT TO §1004.40(b) (5)

15	HR-4 - Schedule A Line 5 (Less Diverted Milk)	342,754	8,764,933 ·
16	Plus Shrinkage (2% of Line 15 above)	6,855 ·	175,298 ·
17	HR-R - Schedule B, Line 15		
18	HR-4 - Schedule B, Lines 6 through 10 (Bulk Tank Lots)		
19	HR-4 - Schedule C, Type (h) (Bulk) (Class II Not Requested)		
20	HR-4 - Schedule C, Type (f)		
21	HR-4 - Schedule C, Type (1) (Bulk) (Class II Not Requested)		
22	Total (Lines 17 through 21)	— ·	— ·
23	Plus Shrinkage (1.5% of Line 22)	— ·	— ·
24	HR-4 Schedule E (BULK TANK LOTS TRANSFERRED)	334,282 ·	8,665,658 ·
25	Less Shrinkage (1.5% of Line 24 above)	(5,014) ·	(129,985) ·
26	Class II Shrinkage To Other Receipts (Add Lines 16, 23, Less Line 25)	1,841 ·	45,313 ·

* Not to exceed 0.5% of farm weights of producer milk received by a cooperative association as a handler pursuant to § 1004.9(c)

Handler Dairylea - Honesdale, Pa. Delivery Period NOV 1972 19

Plaintiff's Trial Exhibit 9 - Order 4 Report for October 1972 for Flemington, New Jersey Plant

W% HR-4
(-70)

UNITED STATES DEPARTMENT OF AGRICULTURE
Agricultural Marketing Service
Dairy Division

FORM APPROVED
BUDGET BUREAU
NO. 40-R3160

MIDDLE ATLANTIC MILK MARKETING AREA
Federal Order #4
REPORT OF RECEIPTS AND UTILIZATION

ndler
iling
dress

Johanna Farms, Inc.
P.O. Box 272
Flemington, NJ 08822

A-1

Delivery Month October 19 72

Plant Location Flemington, New Jersey

RECEIPTS

Schedule A. RECEIPTS OF PRODUCER MILK

No. Line	FROM	NO. OF PRODUCERS	BASE POUNDS	PRODUCT POUNDS	BUTTERFAT POUNDS	SKIM POUNDS
1	Members Dairylea Coop. Assn.	355		12,325,443	456,394	11,869,049
2	Members ____ Coop. Assn.					
3	Nonmember producers					
4	Own Farm Production					
5	TOTAL PRODUCER RECEIPTS	355	12,741,084	12,325,443	456,394	11,869,049

Schedule B. RECEIPTS OF FLUID MILK PRODUCTS FROM OTHER POOL HANDLERS (Classification by H.A.)

No. Line	NAME AND LOCATION OF POOL PLANT	PKG. OR BULK	CLASS REQ.	TOTAL PRODUCT LBS.	TOTAL B. F. LBS.	CLASS I PRODUCT LBS.	CLASS I B. F. LBS.	CLASS II PRODUCT LBS.	CLASS II B. F. LBS.
6	Dairylea-Beaver Springs			2,234,320	79,715	2,234,320	79,715		
7	-New Foundland			1,714,990	63,700	1,714,990	63,700		
8	Manheim			8,332,430	309,527	8,332,430	309,527		
9	Mt. Joy Farmers Coop			1,740,420	64,591	1,740,420	64,591		
10	Penn								
11	Total Other Pool Plants			5,695,730 [14,022,160]	208,000 [517,533]	14,022,160	517,533		
	Cooperative Associations: Acting as handler:								
12									
13									
14									
15	Total Cooperative Associations			14,022,160					
16	TOTAL (Add Lines 11 and 15)			5,695,730	517,533	14,022,160	517,533		
17	Butterfat Pounds 517,533			208,000		517,533			
18	Skim Pounds 13,510,427			5,487,730		13,510,427			

Schedule C. RECEIPTS FROM OTHER SOURCES

No. Line	TYPE*	NAME AND LOCATION OF PLANT	CLASS II REQUESTED	PRODUCT	PRODUCT POUNDS	BUTTERFAT POUNDS	SKIM POUNDS
19	D	Cream Opening Inventory			46,050	13,329	32,721
20	E	Powder			349,000		349,000
21	B	Sealtest Foods -Richmond Hill, N.Y.			331,439	3,314	328,125
22	B	Sicomac, Wyckoff, N.J.			9,636	337	9,299
23	H	Sealtest Foods, Middleburg, Pa.		3	234,980	8,683	226,097
24	H	Great Bend, Nicholson, Pa.		-	538,540	19,217	519,323
25	H	Langlon Creamery, Deposit, N.Y.		-	42,900	1,544	41,356
26	H	Carnation, South Dayton, N.Y.		3	565,070	20,986	544,084
27	H	Bordens, Wellsboro, Pa.		4	46,160	1,731	44,429
28	H	Deltown Foods, Herkimer, N.Y.		5	49,700	1,789	47,911
29	H	From Continuation Sheet			9,426,690	340,035	9,075,654
30		Please Assign Class II to:			[1,019,263]	[40,407]	[978,851]
31	H	Valley Cream, Inc., South Waverly, Pa.		-	2,066,500	76,233	1,990,267
32		TOTAL OTHER SOURCE RECEIPTS	5,272,042		13,707,475	507,834	13,199,641
33		Beginning Inventory of Packaged Fluid Milk Products			507,847	14,122	493,725
34		Beginning Inventory of Bulk Fluid Milk Products			611,786	21,764	590,022
35		TOTAL TO ACCOUNT FOR. Add lines 5, 16, 32, 33, 34			32,848,281	1,107,520	31,650,761

* TYPES OF OTHER SOURCE RECEIPTS

(a) Packaged Certified Milk
(b) Other Order Plants—Packaged
(c) Cream receipts from any source
(d) Cream in Opening Inventory
(e) Item other than a fluid milk product at skim equivalent (including receipts for which disposition is not established)
(f) Dairy farmers for other markets
(g) Unidentified sources
(h) Producer handlers under any order
(i) Governmental Agency
(j) Filled milk-unregulated supply plants
(k) Filled milk-other order plant (individual handler pool)
(l) Unregulated supply plants (bulk)
(m) Unregulated supply plants (packaged)
(n) Other order plants classified & priced (bulk)
(o) Other order plants not classified & priced (bulk)

I declare under the penalties provided by law, that this report (including schedules and statements), has been examined by me and to the best of my knowledge and belief is a true, correct and complete report. I also certify that I am authorized to sign this report.

Johanna Farms, Inc.
Name of Handler

(Person Authorized to Sign for Handler)

THIS REPORT, PROPERLY FILLED OUT, MUST BE SUBMITTED TO THE MARKET ADMINISTRATOR ON OR BEFORE THE 8TH DAY AFTER THE END OF THE [illegible] (see sec. 30)

Plaintiff's Trial Exhibit 9 - Order 4 Report for October 1972 for Flemington, New Jersey Plant

C-7 (8-70)
HANDLER Johanna Farms, Inc. PLANT LOCATION Flemington, N. J. MONTH October 19 72

CONTINUATION SHEET

RECEIPTS (Classification by M.A.)

	NAME AND PLANT LOCATION	PRODUCT	Schedule	Type*	Reg. or Bulk	Class Reg.	TOTAL PRODUCT POUNDS	TOTAL B.F. LBS.	CLASS I PRODUCT POUNDS	CLASS I B.F. LBS.	CLASS II PRODUCT POUNDS	CLASS II B.F. LBS.
1	Dairylea-New Milford, Pa.						101,080	3,740				
2	Cortland, N.Y.						100,200	3,657				
3	Mt. Upton, N.Y.						50,340	1,837				
4	Honesdale, Pa.						~~8,332,430~~	~~309,527~~				
5	Wyalusing, Pa.						148,440	5,492				
6	Horsehead, Pa.						145,260	5,520				
7	Vernon, N.Y.						150,480	5,568				
8	Spring Mills, Pa.						398,460	14,595				
9							~~2,426,690~~	~~349,936~~				
10							1,094,260	40,409				
11												
12												
13												
14												
15												
16												
17												
18												
19												
20												

UTILIZATION (Classification by M.A.)

	NAME AND PLANT LOCATION	PRODUCT	Schedule	Type*	Reg. or Bulk	Class Reg.	TOTAL PRODUCT POUNDS	TOTAL B.F. LBS.	CLASS I PRODUCT POUNDS	CLASS I B.F. LBS.	CLASS II PRODUCT POUNDS	CLASS II B.F. LBS.
1												
2												
3												
4												
5												
7												
8												
9												
10												
11												
12												
13												
14												
15												
17												
18												
19												
20												
21												

* Types of other source receipts = Sch.-C

Plaintiff's Trial Exhibit 9 - Order 4 Report for October 1972 for Flemington, New Jersey Plant

Dealer Johanna Farms, Inc. Plant Flemington, New Jersey Month October 19 72

UTILIZATION

Schedule D. ROUTE DISPOSITION	In Marketing Area Product Lbs.	In Marketing Area Butterfat Lbs.	In Area of Order 2 Product Lbs.	In Area of Order 2 Butterfat Lbs.	Unregulated Area Product Lbs.	Unregulated Area Butterfat Lbs.	TOTAL Product Lbs.	TOTAL Butterfat Lbs.
Certified Milk								
Whole Milk	14,266,675	474,328	11,992,487	398,231			26,259,162	872,559
Chocolate Milk	283,036	9,881	185,933	6,520			468,969	16,401
Chocolate Drink	1,704	34	56,630	1,133			58,334	1,167
Buttermilk	139,764	2,017	95,293	1,920			235,057	3,937
Skim								
Skim Fortified	692,775	1,025	726,057	1,075			1,418,832	2,100
2% Low Fat	613,510	5,953	519,191	6,749			1,132,701	12,702
Plain or flavored milk drink								
Filled milk (Skim)								
Mixtures less than 10%								
Total Route Disposition	15,997,484	494,038	13,576,590	415,634			29,574,074	909,672
Closing Inventory of Package Fluid Milk Products							205,454	5,199
Total							29,779,528	914,871

Schedule E. TRANSFERS AND DIVERSIONS TO OTHER PLANTS (Classification by M.A.)

	Class II Req	Product	Pkg. Bulk	T D	TOTAL Product Lbs	TOTAL B. F. Lbs.	CLASS I Product Lbs	CLASS I B. F. Lbs.	CLASS II Product Lbs	CLASS II B. F. Lbs.
Pool Plants:										
Total										
Nonpool plants:										
Hohnckers Dairy, Inc.		Milk	P	T	688	28	688	28		
		Fort Skim	P	T	33,329	49	33,329	49		
		Low Test	P	T	13,566	123	13,566	123		
Total					47,583	200	47,583	200		
Total Schedule E					47,583	200	47,583	200		

Schedule F. OTHER UTILIZATION AND DISPOSITION	In Marketing Area Product Lbs	In Marketing Area Butterfat Lbs	Mktg. Area Order #2 Product Lbs	Mktg. Area Order #2 Butterfat Lbs	Unregulated Area Product Lbs.	Unregulated Area Butterfat Lbs.	Product Lbs	Butterfat Lbs
Cream (10.18%)	106,931	11,055	159,071	16,445			266,002	27,500
Cream (18.27%)	265,391	47,824	10,238	1,845			275,629	49,669
Cream (Over 27%)	12,239	4,660	46,373	17,657			58,612	22,317
Sour Cream							24,215	6,426
Aerated Cream								
Cream transfers to other plants							219,205	31,103
Cream on hand end of month							57,669	11,957
Livestock Feed								
Dumped								
Used to Produce:								
Products containing 6% or more non-milk fat (skim milk)								
Yogurt								
Cottage Cheese								
Ice Cream Mix								
Condensed								
Skim or Whole Milk Powder								
Eggnog								
Butter								
Class II portion fluid skim equivalent							329,445	
Bulk Fluid Milk Products to Mfg. of non milk Products							2,374	19
Closing Inventory of bulk fluid milk products							1,391,695	49,500
Total Schedule F							2,585,019	249,036

Schedule G - TOTAL SHRINKAGE OR (Overage)	Product Lbs.	Butterfat Lbs.	Skim
Total Schedule D	29,779,528	914,871	28,864,657
Total Schedule E	47,583	200	47,383
Total Schedule F	2,585,019	249,036	2,335,983
Sub Total	32,412,130	1,164,007	31,248,023
Shrinkage or (overage)	436,151	33,423	402,728
Total to Account for - (page 1 - line 35)	32,848,281	1,197,520	31,650,761

Plaintiff's Trial Exhibit 10 - Net Pool Obligations for October 1972 for Flemington, New Jersey Plant

(C-5 7-72)

Johanna Farms, Inc.
P.O. Box 272
Flemington, NJ 08822

A-1

OCT 1972 19—

Flemington, N.J.

POOL OBLIGATIONS

PRODUCER SETTLEMENT FUND

	HANDLER'S POOL OBLIGATION	PRODUCT POUNDS	PRICE PER CWT.	VALUE
CHARGES:				
1	Class I Producer Milk (Line 32, PC-2)	11,947,513.	7.85.	939,449.62
2	Class I Cooperative Milk §1004.9(c), HR-4, Sch. B, Line 15			
3	Less Location Differential on Producer & Coop. milk, Class I			(
4	Class II producer milk (Line 32, PC-2)	357,931.	5.36.	18,827.17.
5	Class II Cooperative Milk (§ 1004.9(c), HR-4, Sch. B, Line 15			
6	Class I Overage (At test)			
7	Class II Overage (At test)			
8	Direct Delivery Differential - Overage			
9	Less: Location Differential - Class I overage			(
10	Reclassification of Bulk Opening Inventory to Class I			
11	Revaluation of Packaged opening inventory (plus or minus)	507,847.	.06.	304.71.
12	Other Source Milk assigned Class I. § 1004.60(d)			
13	Other Source Milk assigned Class I § 1004.60(c)			
14	Net Pool Obligation			$ 958,581.57
CREDITS:				
15	Producer milk base at Uniform Price for base milk	10,761,084.	7.13.	767,265.29.
16	Producer milk excess at Uniform Price for excess milk	1,514,359.	5.31.	81,503.10.
17	Cooperative milk base at Uniform Price for base milk			
18	Cooperative milk excess at Uniform Price for excess milk			
19	Less Location differentials Producer and Cooperative milk (Lines 15 and 17)			(
20	Other source milk - Line 13 x weighted average price plus 5¢			
21	Less Location differential on Line 20			(
22	Total Lines 15 thru 21			$ 848,768.39.
23	Net Producer Settlement Fund Line 14 less 22	charge ☑ credit ☐		109,813.18
24				
25	Audit Adjustments:	charge ☐ credit ☐		
26	Total Producer Settlement Fund: Payment due on or before the 15th day of the month Payment by Market Administrator will be made on or before the 17th day of the month			$ 109,813.18.

DEDUCTION FOR MARKETING SERVICES

27	Non-member producer receipts, Schedule A - Line 3		
28	Audit Adjustments:	charge ☐ credit ☐	None
29	Total Marketing Services Fund: Payment due on or before the 20th day of the month		

ASSESSMENT FOR ORDER ADMINISTRATION

30	Producer Receipts, Schedule A-Line 5 Except a Cooperative under 1004.9(c)		12,335,443.
31	Less: Bulk transfers to Pool Plants by a Cooperative operating a pool plant		(
32	Receipts from Cooperative - § 1004.9(c) - Schedule B, Line 15		
33	Bulk receipts from a pool plant operated by a Cooperative Association		14,018,160.
34	Other Source milk assigned Class I - Lines 12 and 13		
35	Total receipts subject to assessment		26,353,603
36	Assessment rate per hundredweight		.025
37	Assessment (Line 35 x Line 36)		$ 6,588.40.
38			
39	Audit Adjustments:	charge ☐ credit ☐	
40	Total Administrative Fund: Payment due on or before the 20th day of the month		$ 6,588.40.

41	Total due Market Administrator: Exclusive of any credit due from Market Administrator for producer settlement fund on Line 29	$ 116,401.58

Please make check payable to:
FEDERAL MILK MARKET ADMINISTRATOR

Mail to:
Federal Milk Market Administrator
300 North Lee Street, Suite 320
Alexandria, Virginia 22314

80

Plaintiff's Trial Exhibit 10 - Net Pool Obligations for October 1972 for Flemington, New Jersey Plant

PC-4 (8-70)

Federal Order No. 4

COMPUTATION OF PAYMENT ON OPENING INVENTORY OF BULK FLUID MILK PRODUCTS §1004.44(c)(1)

ASSIGNED TO CLASS I Pursuant to § 1004.44(a)(7) and (b)	Product Pounds	Price	Value
Class I Price - Current Month (Less Location Differential)	PC-2, Line 19	$.	
Class II Price - Prior Month		(.)	
Product Pounds x Difference	✓	$.	-$

(To PC-5, Line 10)

COMPUTATION OF REVALUATION OF OPENING INVENTORY OF PACKAGED FLUID MILK PRODUCTS §1004.44(c)(3)

ASSIGNED TO CLASS I Pursuant to § 1004.44(a)(4) and (b)	Product Pounds	Price	Value
Class I Price - Current Month	HR-4, Schedule C - Line 33	$7.85	
Class I Price - Prior Month		7.79	(Plus
Product Pounds x Difference	507,847	$ .06	-$ 304 71

(To PC-5, Line 11)

COMPUTATION OF PAYMENT ON OTHER SOURCE MILK §1004.60(d)

ASSIGNED TO CLASS I Pursuant to § 1004.44(a)(5)(i)(ii)(iii)(iv) and (b)	Product Pounds	Price	Value
Class I Price - Current Month	PC-2, Lines, 8, 9, 10, 11	$.	
Location Differential *		(.)	
Class II Price - Current Month		(.)	
Product Pounds x Difference	✓	$.	-$

(To PC-5, Line 12)

ASSIGNED TO CLASS I Pursuant to § 1004.44(a)(5)(v)and (vi) and (b)	Product Pounds	Price	Value
Class I Price - Current Month	PC-2, Lines 12, 13	$.	
Location Differential **		(.)	
Class II Price - Current Month	✓	(.)	
Product Pounds x Difference		$.	-$

(To PC-5, Line 12)

COMPUTATION OF PAYMENT ON OTHER SOURCE MILK §1004.60(e)

ASSIGNED TO CLASS I Pursuant to § 1004.44(a)(9) and (b)	Product Pounds	Price	Value
Class I Price - Current Month	PC-2, Line 22	$.	
Location Differential **		(.)	
Product Pounds x Difference	✓	$.	$

(To PC-5, Line 13)

* Based on Location of the receiving plant (a) /** Based on location of the nearest nonpool plant

Handler Johnson Farms, Inc. Delivery Month OCT 1972

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Plaintiff's Trial Exhibit 10 - Net Pool Obligations for October 1972 for Flemington, New Jersey Plant

PC-2 (4-72)

CLASSIFICATION OF PRODUCER MILK

			CLASS I POUNDS		CLASS II POUNDS	
			Butterfat	Skim	Butterfat	Skim
1	TOTAL UTILIZATION (PC 1 Lines 2 + 14 & 3 + 13)		925,554.	28,912,041.	268,946.	2,738,731.
	SUBTRACT HR-4 Schedule C Type					
2	Receipts from Other Order Plants Classified & Priced Duplicated by similar shipments to same plant					
3	Shrinkage Assigned Class II (pc 1 Line 12)		////////////	////////////	12,453.	393,234.
4	Receipts Packaged Certified Milk & Exempt Milk	a			////////////	////////////
5	Receipts Pkg. Fluid Milk Other Orders (Except Type k) Lesser of 2% or Balance Remaining	b	////////////	////////////	73.	6,748.
6	Remainder not deducted on Line 5	b	3,578.	330,676.	////////////	////////////
7	Beginning Inventory Pkg. Fluid Milk Products (HR-4, Page 1, Line 33)		14,122.	493,725.	////////////	////////////
8	Cream Receipts & Opening Inventory and Receipts other than a fluid milk product	c,d e			13,339.	382,521.
9	Receipts Dairy Farmers Other Markets and from Unidentified Sources	f g				
10	Receipts from Producer handlers under any order	h				
11	Receipts Governmental Agency as handler (other than exempt milk)	i				
12	Receipts Reconstituted Skim Milk in Filled Milk from Unregulated Plants	j				
13	Receipts Reconstituted Skim Milk in Filled Milk from Other Order Plants (individual handler pool)	k				
14	Receipts from unregulated supply plants Bulk or Pkg. (Class II requested)	l,m	////////////	////////////		
15	Remainder		910,854.	28,087,639.	236,102.	1,956,228.
16	Receipts from Unregulated Supply plants (PC 3 Line 20)		////////////	////////////		
17	If deduction on Line 16 exceeded Class II on Line 15 Increase Class II and decrease Class I by a like amount 1/					
18	Receipts other orders (classified & priced)-bulk-Class II requested-in excess of similar movement to such plant	n	////////////	////////////		
19	Beginning Inventory Bulk Fluid milk products (HR-4 - Page 1, Line 34)				31,764.	590,033.
20	ADD shrinkage deducted on line 3 above		////////////	////////////	12,453.	393,234.
21	Remainder (percentages) % % % %		910,854.	28,087,639.	233,790.	1,759,430.
22	Receipts unregulated plants & other order plants not classified & priced not deducted on Lines 14 or 16 above	l m,o				
23	If deduction on Line 22 exceeds the remainder on Line 21 increase such Class and decrease the other by like amount 1/					
24	Remainder (percentages) 77.58% 74.11% 73.42% 5.89%		910,854.	28,087,639.	233,790.	1,759,430.
25	Utilization Percentage 58.% 65.% 42% 35%.		////////////	////////////	////////////	////////////
26	Receipts other orders classified & priced not deducted on Line 18 above (higher % of Line 24 or 25)	n	99,016.	2,903,805	71,701.	1,563,588.
27	If deduction on Line 26 exceeds Class II on Line 24 increase Class II and decrease Class I by a like amount 1/				1,640,289	
28	Receipts other pool plants (HR-4, page 1, Line 11)		517,533.	13,510,127.		
29	Receipts Cooperatives as handler, (HR-4, page 1, Line 15)					
30	Overage					
31	PRODUCER RECEIPTS ALLOCATED		294,205.	11,673,207.	163,089.	195,342.
32	PRODUCT POUNDS		11,967,513.		358,431.	
33	BUTTERFAT TEST		2.45930.		45.38499.	
34	TOTAL PRODUCER MILK - Product Pounds-Butterfat Pounds		12,325,443.		456,394.	

1/ Reverse on the nearest other pool plant of the handler.

Handler Johnson Farms, Inc. Delivery month OCT 1972 19__

1,640,289
450,201

A 329

Plaintiff's Trial Exhibit 10 - Net Pool Obligations for October 1972 for Flemington, New Jersey Plant

PC-1
(4-72)

Federal Order No. 4

SHRINKAGE ALLOCATION AND COMPUTATION

		Product Pounds	Butterfat Pounds	Skim Pounds
1	Total To Account For (HR-4, Page 1, Line 35)	32,848,291 ·	1,197,523	31,650,761 ·
2	Class I Utilization (HR-4 - Schedules D and E)	29,827,111 ·	915,171 ·	28,912,140 ·
3	Class II Utilization (HR-4 - Schedules E and F)	2,585,019 ·	249,294 ·	2,335,993 ·
4	Total Utilization (Lines 2 and 3)	32,412,130 ·	1,164,477 ·	31,248,033 ·
5	Overage (Line 4 less Line 1)	—	—	—
6	Shrinkage (Line 1 less Line 4)	436,161 ·	33,473 ·	402,728 ·

OTHER SOURCE SHRINKAGE EXCLUSIVE OF THAT SPECIFIED UNDER § 1004.40(b) (5)

7	Total - HR-R - Schedule C (Line 32) less Lines 19, 20 and 21 below	16,999 ·	719,945 ·
8	Total - HR-4 - Schedule A - Line 5 (Less Diverted Milk), Schedule B - Line 16 (Less Packaged) and Schedule C - Line 32	1,161,634 ·	30,567,014 ·
9	Line 7 divided by Line 8	1.46 %	2.36 %

SHRINKAGE CLASSIFICATION

10	Class II Shrinkage To Other Source (% on Line 9 x Line 6)	(488 ·)	(9,504 ·)
11	Net Shrinkage To Other Receipts (Line 6 less Line 10)	32,925 ·	393,224 ·
12	Class II Shrinkage To Other Receipts * (Lesser of Line 11 or Line 26)	19,452 ·	393,224 ·
13	Total Class II Shrinkage (Add Line 10 and Line 12)	19,940 ·	402,728 ·
14	Class I Shrinkage To Other Receipts (Line 6 less Line 13)	13,483 ·	— ·

MAXIMUM CLASS II SHRINKAGE PURSUANT TO § 1004.40(b) (5)

15	HR-4 - Schedule A Line 5 (Less Diverted Milk)	451,394 ·	11,814,149 ·
16	Plus Shrinkage (2% of Line 15 above)	9,028 ·	237,381 ·
17	HR-R - Schedule B, Line 15	— ·	— ·
18	HR-4 - Schedule B, Lines 6 through 10 (Bulk Tank Lots)	517,533 ·	13,510,137 ·
19	HR-4 - Schedule C, Type (h) (Bulk) (Class II Not Requested)	170,717 ·	4,467,395 ·
20	HR-4 - Schedule C, Type (f)		
21	HR-4 - Schedule C, Type (1) (Bulk) (Class II Not Requested)		
22	Total (Lines 17 through 21)	687,250 ·	17,977,532 ·
23	Plus Shrinkage (1.5% of Line 22)	10,324 ·	269,671 ·
24	HR-4 Schedule E (BULK TANK LOTS TRANSFERRED)	— ·	— ·
25	Less Shrinkage (1.5% of Line 24 above)	(—)	(—)
26	Class II Shrinkage To Other Receipts (Add Lines 16, 23, Less Line 25)	19,452 ·	507,051 ·

* Not to exceed 0.5% of farm weights of producer milk received by a cooperative association as a handler pursuant to § 1004.9(c)

Handler Johanna Farms, Inc. Delivery Period OCT 1972 19____

Plaintiff's Trial Exhibit 11 - Order 4 Announcement of Prices for November 1972

UNITED STATES DEPARTMENT OF AGRICULTURE
Agricultural Marketing Service
Dairy Division
MIDDLE ATLANTIC MARKETING AREA
Federal Order No. 4

Telephone: (703) 549-7000

300 North Lee Street — Suite 320
Alexandria, Virginia 22314

ANNOUNCEMENT OF UNIFORM PRICES FOR BASE AND EXCESS PRODUCER MILK-NOVEMBER 1972

Hundredweight Prices for 3.5% Milk F.O.B. Plant Location within 55 miles of Philadelphia, Pa., and also within 75 miles from the nearer of Washington, D. C. or Baltimore, Md.

BASE MILK ..... $ 7.25*
EXCESS MILK ..... $ 5.33*
Butterfat Differential ..... $ .080

COMPUTATION OF WEIGHTED AVERAGE AND UNIFORM PRICES

	Percent	Pounds of Milk	Price Per Cwt.	Value
CLASS I PRODUCER MILK	69.23	252,141,948	$ 7.86613	$ 19,833,810.57
CLASS II PRODUCER MILK	30.77	112,067,373	5.38000	6,029,224.70
Total Producer Milk	100.00	364,209,321	$ 7.10115	$ 25,863,035.27
Other source receipts of unregulated fluid milk assigned Class I		274,401	7.68673	21,092.47
Total Pooled Milk		364,483,722	$ 7.10159	$ 25,884,127.74
Add: Value of overage				4,547.84
Add: Value of reclassified inventory				1,797.24
Adjust: For Class I price change on inventory of pkgd. fluid milk				3,234.98
Add: Value of other source receipts (unapproved or nonfluid) assigned Class I				3,019.78
Add: Location adjustment on producer and other source milk				79,700.68
Less: Advertising and Promotion fund				182,104.66
Add: ½ Unobligated balance in producer settlement fund				179,737.58
Total			$ 7.12626	$ 25,974,061.18
Adjustment pursuant to § 1004.61(a)(6): ($.04626)				
WEIGHTED AVERAGE PRICE - 3.5% MILK			$ 7.08	
Less: Value of other source receipts - 3.5% milk		274,401	7.13	19,564.79
Less: Value of excess milk - 3.5% milk		31,387,047	5.33	1,672,929.61
Base Milk Value		332,822,274	$ 7.29566	$ 24,281,566.78
Less: Reserve for producer settlement fund			.04566	151,951.92
UNIFORM BASE MILK PRICE - 3.5% MILK			$ 7.25	$ 24,129,614.86

MARKET INFORMATION

PRODUCER DATA

Month and Year	Number of Producers	Average Daily Receipts (Pounds)				Class I Percentage of Producer Milk
		All Producers	Class I	Class II	Per Producer	
Nov., 1972	8,290	12,140,311	8,404,732	3,735,579	1,464	69.23
Oct., 1972	8,336	12,179,914	8,175,744	4,004,170	1,461	67.12
Nov., 1971	8,054	11,897,660	8,072,308	3,825,352	1,477	67.85

PRICE DATA - 3.5% BUTTERFAT								HANDLER DATA		
Month and Year	Wt. Avg. Uniform Price	Uniform Base Price	Excess Milk Price	Class I	Class II	Producer B.F. Diff.	Number of Plants	Other Source Receipts (1000 Lbs)	Daily Class I Sales (Pounds) Total	November 1972
Nov., 1972	$ 7.08	$ 7.25	$ 5.33	$ 7.88	$ 5.28	$ .080	56	21,967	8,482,073	In Area 6,844,412
Oct., 1972	$ 6.97	$ 7.13	$ 5.21	$ 7.85	$ 5.26	$ .080	56	21,814	8,304,682	
Nov., 1971	$ 6.74	$ 6.93	$ 4.92	$ 7.60	$ 4.92	$ .078	62	21,083	8,244,925	Outside 1,637,661

* Price does not include 6-cent direct-delivery differential pursuant to § 1004.79.

		Skim Milk	Butterfat
Estimated utilization in each class for the month of November	Class I	68%	61%
	Class II	32%	39%

Released: December 13, 1972

Edward L. St. Clair
Market Administrator

Plaintiff's Trial Exhibit 11 -
Order 4 Announcement of Prices
for November 1972

RECEIPTS AND DISPOSITION OF MILK, CREAM AND SKIM MILK REPORTED BY ORDER NO. 4 POOL HANDLERS

October, 1972

RECEIPTS	Pounds, Milk Cream and Skim	Pounds Butterfat
Producer and Own Farm	377,577,325	13,966,679
Opening Inventory		
Pkg. Milk & Skim	10,858,847	332,808
Bulk Milk & Skim	8,768,355	283,913
Cream	1,037,113	387,803
Other Sources		
Milk & Skim from other Order Plants	6,723,400	237,830
Milk & Skim from Unregulated Supply Plants	684,164	25,137
Other than a fluid milk product	12,137,351	56,537
Cream	1,231,684	432,171
TOTAL RECEIPTS	419,018,239	15,722,878
CLASS I DISPOSITION		
In-Area Route Sales		
Whole Milk 2/	168,903,264	5,855,169
Chocolate Milk	9,548,619	338,394
Chocolate Drink	1,202,752	19,370
Buttermilk	1,432,923	12,222
Skim Milk	3,249,341	7,985
Fortified Skim Milk	13,635,907	88,268
2% Fortified Skim Milk	10,074,054	200,571
Total In-Area Route Sales 1/	208,046,860	6,521,979
Outside-Area Route Sales		
Whole Milk	37,519,884	1,270,952
Chocolate Milk	1,043,843	36,489
Chocolate Drink	147,468	2,311
Buttermilk	381,782	3,688
Skim Milk	469,427	661
Fortified Skim Milk	2,898,754	14,364
2% Fortified Skim Milk	1,901,784	33,426
Total Outside-Area Route Sales	44,362,942	1,361,891
Outside Area Shipments	5,035,345	175,320
Closing Inventory-packaged fluid milk	10,783,255	329,448
Shrinkage in Class I	1,013,515	121,741
Total Class I Disposition	269,241,917	8,510,379

CLASS II DISPOSITION	Pounds, Milk Cream and Skim	Pounds Butterfat
In-Area Route Sales		
Cream (10-18%)	1,739,060	192,381
Cream (18-27%)	501,421	92,628
Cream Over 27%	129,416	49,613
Outside-Area Route Sales		
Cream (10-18%)	364,538	38,524
Cream (18-27%)	35,606	6,637
Cream Over 27%	63,095	23,878
Sour Cream-On Routes in and out of Area	782,527	121,709
Other Cream Disposition	5,230,118	1,986,490
Disposition to Non-Pool Plants to Produce:		
Non-milk products	3,197,996	126,139
Cottage & Other Cheeses	17,012,454	568,837
Ice Cream and Ice Cream Mix	2,696,565	99,167
Condensed Skim & Milk	11,256,554	418,365
Skim and Milk Powder	2,234,540	82,842
To Other Order Plants	13,236,331	465,447
Utilized in Pool Plants to Produce:		
Cottage & Other Cheeses	18,994,563	140,550
Ice Cream and Ice Cream Mix	11,592,943	760,091
Skim and Milk Powder	17,901,575	34,740
Condensed Skim & Milk	16,648,484	283,823
Yogurt	1,154,625	12,432
Eggnog & Butter	894,611	685,239
Fluid Skim Equivalent	4,677,156	-
Livestock Feed	877,752	27,127
Dumped	318,964	9,224
Closing Inventory:		
Bulk Milk and Skim	12,598,992	430,836
Cream	1,154,378	423,743
Shrinkage in Class II	4,482,058	132,037
Total Class II Disposition	149,776,322	7,212,499
TOTAL DISPOSITION	419,018,239	15,722,878

ALLOCATION OF OTHER SOURCE RECEIPTS

Class I	Class II	Total
Pounds		
4,902,789	15,873,810	20,776,599

1/ Includes some out of area sales on split routes.

2/ Also includes milk cream mix.

Plaintiff's Trial Exhibit 12 - Schedule Showing Benefit to Order 4 Producer Price Resulting from Shifting Honesdale Plant and Salem Bulk Tank Unit to Order 4

DEFT. Ex C
for ID 1/16/73 PC

Indicators of How Shifting Honesdale, Pa. Plant and Salem Bulk Tank Unit to Order 4 Has Helped Order 4 Producer Price

	Producer Receipts	Class I (Fluid Milk)	Percent Class I
Aug. '71	378,942,132 lbs.	221,710,579 lbs.	58.51
Sept.	370,650,147 "	241,426,857 "	65.14
Oct.	374,361,692 "	242,015,477 "	64.65
Nov.	356,929,797 "	242,169,236 "	67.85
Aug. '72	373,240,249 lbs.	227,850,140 lbs.	61.05
Sept.	361,386,340 "	240,750,719 "	66.62
Oct.	377,577,325 "	253,448,073 "	67.12
Nov.	364,209,321 "	252,141,948 "	69.23

Other Source Receipts by Order 4 Handlers

	1971	1972
Aug.	21,164,000 lbs.	32,546,000 lbs.
Sept.	22,537,000 "	32,310,000 "
Oct.	21,380,000 "	21,814,000 "
Nov.	21,083,000 "	21,967,000 "

Utilization of Johanna Direct Delivery Receipts - 1971

	Producer Receipts	Class I (Fluid Milk)	Percent Class I
Aug.	10,208,108 lbs.	8,944,209 lbs.	87.62
Sept.	9,562,610 "	9,301,853 "	97.27
Oct.	9,415,876 "	9,320,766 "	98.99
Nov.	8,720,809 "	8,641,333 "	99.09

Utilization of Johanna Direct Delivery Receipts - 1972

	Producer Receipts *	Class I (Fluid Milk)	Percent Class I
Aug.	9,938,941 lbs.	9,938,941 lbs.	100.00
Sept.	9,230,329 "	9,230,329 "	100.00
Oct.	12,325,443 "	11,967,512 "	97.10
Nov.	11,290,929 "	11,184,363 "	99.06

* Includes Salem Bulk

Receipts and Utilization of Honesdale, Pa. as an Order 4 Plant

	Producer Receipts	Class I (Fluid Milk)	Percent Class I
Oct. '72	9,703,543 lbs.	8,568,292 lbs.	88.30
Nov. '72	9,107,677	8,021,356	88.07

Source: Order 4 Pool Reports of Dairylea

Plaintiff's Trial Exhibit 13 (for identification only) - Spot Market Prices for New York - New Jersey Metropolitan Area for 1972

Spot Market Prices for New York - New Jersey Metropolitan Marketing Area - 1972

Price per 40 lb., 85% min. limit.

Weekly -					
Jan. 2	$6.88	June 11	$6.64	Nov. 19	$7.92
Jan. 9	7.05	June 18	6.64	Nov. 26	7.92
Jan. 16	6.95	June 25	6.64	Dec. 3	8.00
Jan. 23	6.90	July 2	6.64	Dec. 10	7.90
Jan. 30	6.90	July 9	6.75	Dec. 17	7.90
Feb. 6	6.90	July 16	6.82	Dec. 24	7.75
Feb. 13	6.90	July 23	7.32	Dec. 31	7.35
Feb. 20	6.85	July 30	7.25		
Feb. 27	6.85	Aug. 6	7.10	Source:	
Mar. 5	6.85	Aug. 13	6.95	U.S.D.A., Daily and	
Mar. 12	6.85	Aug. 20	7.02	Poultry Market News	
Mar. 19	6.82	Aug. 27	7.10		
Mar. 26	6.72	Sep. 3	7.28		
Apr. 2	6.65	Sep. 10	7.60		
Apr. 9	6.65	Sep. 17	7.55		
Apr. 16	6.60	Sep. 24	7.60		
Apr. 23	6.65	Oct. 1	7.70		
Apr. 30	6.75	Oct. 8	7.55		
May 7	6.75	Oct. 15	7.40		
May 14	6.69	Oct. 22	7.55		
May 21	6.72	Oct. 29	7.62		
May 28	6.64	Nov. 5	7.65		
June 4	6.62	Nov. 12	7.75		

Plaintiff's Trial Exhibit 14 (for identification only) - Paper Prepared by Dr. Stewart Johnson Entitled "Will the New 'Twelve-Month Base Excess Plan' Restrict Production?"

dairy marketing

THE COOPERATIVE EXTENSION SERVICE ■ COLLEGE OF AGRICULTURE ■ THE UNIVERSITY OF CONNECTICUT

Prepared by Stewart Johnson
Professor of Agricultural Economics
December 1971

Will the New "Twelve-Month Base Excess Plan" Restrict Production?

Some of the seasonal pricing plans now used also check increases in total output of milk. These are the base excess plans that are used on the pay-out side in all 12 months of the year. Although only 4 of 62 orders use such a plan, where they exist they check expansion in output because to increase bases the added production must be at the excess price.

Most base excess plans now (and even more so in the past) are not used on the pay-out side in the base-forming months. A low-cost "race for base" is possible, so much so that output in base excess markets of this type expands as rapidly as in non-base-excess markets.

The difference in effects as between the two types of base excess plans has not been noted by all dairy leaders. It is important that it be recognized, for a supply-checking base excess plan, with interchangeable bases among the four Northeast orders, might be the best initial supply management provision in Northeast federal orders if national policy changes in that direction.

Seasonal incentive payment plans

Eleven of 62 federal orders now use such a plan (sometimes called the Louisville plan, the federal order under which first used). These include the Connecticut, Boston Regional, and New York-New Jersey orders (Table 1).

Base excess plans

Eleven of 62 federal orders now use base excess plans (if the Puget Sound Class I base plan is included in the count). Included is the Middle Atlantic order (resulting from merger on August 1, 1970 of the Delaware Valley, Upper Chesapeake Bay, and Washington, D. C. orders) (Table 2).

Four of the markets use the base excess plan on the pay-out side in all 12 months of the year. These are Georgia, Middle Atlantic, Oregon-Washington, and Southern Michigan.

All markets with base excess plans use the Class II price as the excess price, and use 100% of deliveries in base-forming months as bases.

Connecticut Agricultural Extension Service, E. J. Kersting, Director, Storrs, Conn. Issued in furtherance of the Acts of Congress of May 8 and June 30, 1914. (10M-8'67)

Plaintiff's Trial Exhibit 14 (for identification only) - Paper Prepared by Dr. Stewart Johnson Entitled "Will the New 'Twelve-Month Base Excess Plan' Restrict Production?"

Table 1. Seasonal incentive payment plans (Louisville plan) for paying producers in federal order markets, January 1, 1972

Marketing area	Deductions		Additions	
	Months	Amounts	Months	Amounts
Boston Regional and New York-New Jersey	March April May and June	10¢ 20¢ 30¢	August Sept. and Oct. November	25% 30% 15% plus interest
Connecticut	March April May and June	20¢ 30¢ 40¢	Same as Boston Regional and New York-New Jersey	
Central Illinois, Southern Illinois, and St. Louis-Ozarks	March and July April-June	15¢ 25¢	Sept. and Dec. Oct. and Nov.	20% 30%
Eastern Ohio-Western Pa. and Ohio Valley	April-July	6% of basic formula prices, preceding year, up to 25¢	Sept.-Dec.	25%
Indiana	Same as Eastern Ohio-Western Pennsylvania and Ohio Valley except deduction percent of 8%, up to 30¢			
Louisville-Lexington-Evansville	Same as Eastern Ohio-Western Pennsylvania, Ohio Valley, and Indiana, except deduction percent of 10%, up to 40¢			
Paducah	April-July	50¢	Oct.-Jan.	25%

Source: Dairy Division, Consumer and Marketing Service, U. S. Department of Agriculture, Washington, D. C.

Benefits from Seasonal Pricing Plans

Marketing efficiency is encouraged by more even production seasonally, including savings related to the size of bulk tanks on dairy farms, hauling of milk from farms, the capacity of plants for manufacturing reserve supplies, and operational costs in dairy plants. Returns to dairy farmers are enhanced by these savings from greater efficiency as well as by higher class prices seasonally for reserve supplies manufactured in the months of low production.

Plaintiff's Trial Exhibit 14 (for identification only) - Paper Prepared by Dr. Stewart Johnson Entitled "Will the New 'Twelve-Month Base Excess Plan' Restrict Production?"

Table 2. Base excess plans for paying producers in federal order markets, January 1, 1972

Marketing area	Base forming period	Base paying period
Central Arkansas	September-January	March-July
Chattanooga	September-January	March-July
Fort Smith	September-January	March-July
Georgia	September-January	March-February
Kansas City	September-December	February-July
Memphis	September-January	March-July
Middle Atlantic	August-December	March-February
Nashville	September-January	March-July
Oregon-Washington	August-December	February-January
Southern Michigan	August-December	February-January
Puget Sound	Class I base plan	

Source: Dairy Division, Consumer and Marketing Service, U. S. Department of Agriculture, Washington, D.C.

Markets with inadequate supplies at peak days of demand in months of lowest production also benefit from a lesser need to go outside their customary supply sources for additional milk.

If base plans are used on the pay-out side in all 12 months of the year, expansion in output would tend to be checked, and blend prices better maintained. Comparing the Middle Atlantic percentage Class I utilization with the percentage for the other 3 Northeast orders combined (New York-New Jersey, Boston Regional, and Connecticut), recent changes have been as follows:

	July-October 1970	July-October 1971	Points decrease	Percent decrease
Middle Atlantic	64.33%	62.46%	1.87	2.91
Other Northeast orders	57.41%	54.98%	2.43	4.23
	August-November 1970	August-November 1971		
Middle Atlantic	65.74%	63.97%	1.77	2.69
Other Northeast orders	59.89%	57.84%	2.05	3.42

Plaintiff's Trial Exhibit 14 (for identification only) - Paper Prepared by Dr. Stewart Johnson Entitled "Will the New 'Twelve-Month Base Excess Plan' Restrict Production?"

The differences are slight, and may have been due to other determining factors, yet the decrease in percentage use in Class I was less in the Northeast market using a base excess plan on the pay-out side all 12 months of the year.

Looking at producer deliveries only, and not percentage use in Class I, the Order 4 (Middle Atlantic) producer deliveries decreased 0.54% between August-November 1971 and August-November 1972, whereas the Order 1, 2, and 15 combined producer deliveries increased 2.37%. These changes are affected by shifts among markets of plants and producers as well as in milk production.

Changes in Prospect Under Boston Regional and New York-New Jersey Order

A petition was filed by the New York-New England Dairy Cooperative Coordinating Committee on December 8 asking for a hearing to increase deduction rates under Orders 1 and 2 by 10¢ in each month.

The objective is to up-date the rates of deduction, taking into account price inflation in the dairy industry since they were first established in early 1967, following the termination of specified seasonal Class I pricing, and, to a small degree, in anticipation of further inflation and to add somewhat to the present seasonal incentive.

The extent of and trends in seasonality of producer milk deliveries in these markets can be seen by comparing high and low months, or March-June with August-November, as follows:

High-month daily deliveries as percent of preceding seasonal low month

	Order 1 (Boston Regional)	Order 2 (New York-New Jersey)
1967	132 (Je. ÷ Nov.)	131 (May ÷ Aug.)
1968	135 (May ÷ Nov.)	128 (May ÷ Nov.)
1969	130 (Je. ÷ Nov.)	130 (May ÷ Nov.)
1970	124 (Je. ÷ Nov.)	129 (May ÷ Nov.)
1971	125 (Je. ÷ Nov.)	130 (Je. ÷ Nov.)

March-June total deliveries as percentage of preceding August-November

	Order 1 (Boston Regional)	Order 2 (New York-New Jersey)
1967	118	124
1968	123	120
1969	116	124
1970	112	121
1971	114 (adjusted for shift of Agawam plant)	120

Plaintiff's Trial Exhibit 15 - Schedule Showing Receipt of Milk at Honesdale Plant from Dairylea Producer Members, August - December 1972

1111.EX 15. for ID. 1/16/73 MM

Honesdale, Pa.

Production and Deliveries to Order 4 (Johanna)

1972	Production (pounds)	Deliveries to Order 4 (pounds)	Percent Delivered to Order 4 Plants %
August	9,383,872	1,518,820	16.19
September	9,224,369	966,700	10.48
October	9,703,543	8,373,260	86.29
November	9,107,677	7,723,800	84.81
December	9,764,728	7,180,550	73.54

Honesdale became an Order 4 pool plant on October 1, 1972 pursuant to Section 1004.7(b)

Source: Dairylea Records

aintiff's Trial Exhibit 16 (for identification only) - Pennmarva's Base Plan

4L2:345C
fw 1/10/73 m

PENNMARVA'S BASE PLAN (Ap. 1970)

Inter-State, Maryland Cooperative and Maryland and Virginia Milk Producers, the members of Pennmarva, received a recommended base plan from the USDA during April 1970. This plan was supported at the hearing in July 1969 by many farmer members and directors of each organization. The only producer opposition came from New York cooperatives.

The main features of this base plan are as follows:

1. The base making months are August through December. July is no longer a base making month. Production is divided by the number of days, with 120 as a minimum.

2. Payment for milk will be on a base and excess system each month of the year.

3. Bases made in August-December are to be used the following March through February. (This is necessary because of the time needed to audit base data.)

4. Name changes on continuing milk production from the same herd will be permitted, per Pennmarva's request, if approved by the USDA. This was not included in the Recommended Decision.

5. Partnerships or joint ownership, if filed with the market administrator, will be permitted to separate and continue with their share of the base.

6. The only cases where a base can be transferred from a continuing farm operation to another person is upon death of the base holder or upon entry into active military service of the base holder. A person can move from one farm to another and continue production with the same base.

7. New producers without a base or regular producers who give up the their base will be accommodated by allowing a portion of their production to be base milk and the remainder will be excess milk. These proportions are as follows:

(a) January and February	- 60% of production as base
(b) March through June	- 50% of production as base
(c) July	- 60% of production as base
(d) August through November	- 70% of production as base
(e) December	- 60% of production as base.

8. Any producer who gives up his base to obtain the above option will not be able to reclaim his old base nor can such base be transferred. He will get a new base the following March, the same as regular producers.

This plan was proposed to meet the challenge of the falling Class I utilization in the region. A significant part of a declining Class I percentage has been caused by transfers of unneeded milk into the Middle Atlantic regional orders from the New York market.

In addition, this plan will reward those producers who have level annual production and who plan their expansion in the fall months.

It is estimated that the base price in each of the 12 months will exceed a market blend price by over $.15 per hundredweight. This is the immediate reward of the program to fall producers and level annual producers.

This program will be voted on by an individual producer referendum. If the plan does not receive a two-third favorable vote of those voting, we will have a wide open marketwide pool. Be sure to vote and we recommend a favorable vote.

Plaintiff's Trial Exhibit 16 (for identification only) - Pennmarva's Base Plan

April 1970

Most prices used are for March 1970

Difference between Base Blend ($6.54) and Market Average Blend ($6.32) = $ .22 / Difference between Base Blend ($.6.54) and Class II ($4.30) = $2.24 = Percent farmer can increase Base Pounds and Receive Market Average Blend

Actual $\frac{(\$6.54 - \$6.32) = \$.22}{(\$6.54 - \$4.30) = \$2.24} = 10\%$

Assumed $\frac{\$6.54 - \$6.39 = \$.15}{\$6.54 - \$4.30 = \$2.24} = 7\%$

- -

31,000 pounds @ $6.54, Base Blend = $2,027

3,100 pounds(10%) @ $4.30 Class II = $ 133
34,100 pounds $2,160

$\frac{\$2,160}{34,100}$ = $6.32 Market Average Blend (what would have received in base making period when not paid on base)

- -

34,100 pounds @ $6.54 = $2,230.00
- 2,027.00
203.00
- 133.00
$ 70.00 x 12 months = $840.00

- -

Amount Base Blend Exceeds Market Average

January
February
March) +$.25
April)
May)
June)
July
August)
September) +$.20
October) +$.15
November)
December)

Plaintiff's Trial Exhibit 17 - Copy of Dairylea's Pool Check Registers

POOL CHECK REGISTER

CONTRACT NO	PLANT	PATRON	DATE
209930	117	01013	12/18/72

$1,087.43

EMIL OR LENA NIKOLON
HENRICK CTR PA 18430

FOR NEW YORK OFFICE USE

NO.	B. F. DIFF. RATE	FAT DIFF. RATE	PATRON
360051	.080	.103	01013

CENT OF INCENT	SERVICES			
16.18	03	4.40	01	
	55	30.60		

DELIVERY PERIOD	PICK UP DATE	PAY PAY	CONTRACT NO.	PLANT
NOV 72	12/18/72	1087.43	209930	117

POUNDS	AREA OF WEIGHING	BF TEST	PRICE AT TEST	PRICE ADJ			BUTTER FAT PERCENT
16,184	6.978	3.90	7.29800	5	5	007	7.19800

TOTAL POUNDS	PLANT NAME	GROSS AMOUNT
16,184	DAIRYLEA COOP INC BULK TANK UNIT HONESDALE PA	1164.92

21790070

POOL CHECK REGISTER

CONTRACT NO	PLANT	PATRON	DATE
209937	117	01065	12/18/72

$1,682.52

MELOUT OR
INGLAND SCHMIDT
PRESTON PARK PA 18455

FOR NEW YORK OFFICE USE

NO	B. F. DIFF. RATE	FAT DIFF. RATE	PATRON
360052	.080	.100	01065

CENT OF INCENT	SERVICES			
34.28	01	20.00	55	
	15	400.45	15	
	15	211.73		

DELIVERY PERIOD	PICK UP DATE	PAY PAY	CONTRACT NO.	PLANT
NOV 72	12/18/72	1682.52	209937	117

POUNDS	AREA OF WEIGHING	BF TEST	PRICE AT TEST	PRICE ADJ			BUTTER FAT PERCENT
34,282	6.978	3.80	7.21800	5	5	007	7.11800

TOTAL POUNDS	PLANT NAME	GROSS AMOUNT
34,282	DAIRYLEA COOP INC BULK TANK UNIT HONESDALE PA	2440.19

25090900

3/12/74

Plaintiff's Trial Exhibit 18 - Copy of Correspondence Between Market Administrator Iverson and Johanna Farms, Inc.

June 19, 1968

Mr. L. S. Iverson,
Market Administrator
U.S. Dept. of Agriculture
Delaware Valley Milk Marketing Area
1523 Walnut Street
Philadelphia, Penna. 19102

Dear Mr. Iverson:

In reply to your letter of June 13, 1968, I have spoken to Mr. Kanya of Dairymen's League regarding the Producer Payroll Report and your requested changes.

Regarding your request on payments relating to Order #4 Producer Milk, this information is not available to us in time to make payment, as required, by the 18th of the month and this is the reason why we make on-account payments during the month with a final payment on the 18th. We usually get this information by telephone.

In filing Form CPR-4, every month we show the amount, check number and date of payment and have provided you with copies of the Dairymen's League invoice showing Class I and Class 2, producer's supplies, patron's deductions, kosher milk premiums and other information which your form does not provide. We also include a credit memorandum for your information.

Such detailed information should satisfy your requirements as to cost of our product and payments made.

Very truly yours,

JOHANNA FARMS INC.

Kurt Goldman

KG:t
CC: Sidney Winton, Esq.
A. Kanya.

Plaintiff's Trial Exhibit 18 - Copy of Correspondence Between Market Administrator Iverson and Johanna Farms, Inc.

UNITED STATES DEPARTMENT OF AGRICULTURE

Consumer and Marketing Service

Dairy Division

DELAWARE VALLEY MILK MARKETING AREA

Federal Order No. 4

Telephone
PEnnypacker 5-5130
Area Code 215

1528 Walnut Street
Philadelphia, Pennsylvania 19102

June 13, 1968

Johanna Farms, Inc.
Flemington, N. J. 08822

Attention: Mr. Kurt Goldman

Gentlemen:

We are returning the Producer Payroll Report submitted by Johanna Farms for the month of April 1968.

In lieu of the Payroll Report on forms prescribed by the Market Administrator, we will accept a Payroll Report on your form provided that all the information in detail required by Section 1004.31(a) is included. For the month of April and subsequent months it will be necessary that your Payroll Report include the total milk and butterfat pounds with test for each individual producer and the total amount due each producer for base milk and for excess milk delivered to your plant. The Payroll Report should be totalled for pounds of milk delivered, total butterfat pounds, total base milk, total excess milk, and aggregate amount due all producers.

When payment is made to the Dairymen's League in total for all producer member receipts, the Payroll Report should show the amount paid, including the check numbers, dates of payments and amount, and reason for any deductions. These payments should relate to the Order No. 4 producer milk only and should not be inter-mingled with payments for other milk.

We are also returning the Report of Payments to Cooperative Associations for the month of April 1968. This report should be completed by providing the information requested on milk pounds, butterfat test, butterfat pounds, rate per hundredweight, and amount of all receipts from pool plants operated by the Dairymen's League Cooperative Association or any other Cooperative Association. The payments to such cooperatives should be identified as to the receipt of milk from each plant and should include the amount, check number and date.

After the requested changes are made, please resubmit these reports promptly.

Very truly yours,

MARKET ADMINISTRATOR

L. S. Iverson
Market Administrator

Opinion (No. 40021), Dated November 15, 1973

- x

DAIRYLEA COOPERATIVE, INC.,

Plaintiff,

-against-

EARL L. BUTZ, Secretary of the Department of Agriculture of the United States,

Defendant.

Index No. 72 Civ. 4653

- x

United States District Court
Southern District of New York

Botein, Hays, Sklar & Herzberg, Esqs. of New York City, Attorneys for Plaintiff; Sydney C. Winton, Esq. and Stanley M. Kolber, Esq., of Counsel.

Whitney North Seymour, Jr., Esq., United States Attorney, Southern District of New York, Attorney for Defendant; Joel Harris, Esq. and Pamela Davis, Esq., Assistant United States Attorneys, of Counsel.

CARTER, District Judge.

OPINION

I

Dairylea is a cooperative of dairy producers which serves as a handler for some of the milk produced by its members. It is suing as a representative of its producer-members to challenge the base-excess provisions of an order regulating the handling of milk in the Middle

Atlantic Region. In its capacity as a handler, Dairylea is required by the order to pay certain amounts into a pool for the milk which is received from producers; in their capacity as producers, Dairylea members are entitled to receive certain amounts for milk which they sell in the Order 4 Region.

This action was brought to challenge the formula by which the amounts of payments to producers are determined; it raises no issue as to the price which handlers are required to pay into the settlement fund. Section 15A of the Agricultural Marketing Agreement Act of 1937, as amended ("the Act"), 7 U.S.C. §601 et seq., §608c(15)(A), provides an administrative remedy for handlers who are aggrieved by provisions of a marketing order. Despite prior rulings which indicate that the administrative remedy is not available to those who seek to adjudicate producer rights, the agency has indicated in this case its willingness to waive any defense to a Dairylea 15A proceeding on the ground of lack of standing. There is, however, no case law to support the proposition that the Department has jurisdiction, pursuant to Section 15(A), to hear a complaint which rests upon an allegedly unlawful diminishment of payments to producers. In Inter-State Milk Producers' Cooperative, Inc. v. St. Clair,

314 F. Supp. 108 (D. Md. 1970) the court noted, at page 111, that:

> "Whether a district court would have jurisdiction [prior to administrative review] to decide such a question at the suit of one or more producers, and the nature of the relief which might be granted would depend upon whether the ruling in question would diminish the equalization pool. *** In the instant case the ruling increases rather than diminishes the equalization pool. ***" [Citations omitted.]

Plaintiff here complains of provisions which reduce payments to certain producers, but do not affect prices paid by handlers. The case is, therefore, analogous to the hypothetical proposed by the Maryland court and district court review should be available without a prior administrative determination.

It, therefore, appears that the court has jurisdiction regardless of plaintiff's failure to seek an administrative remedy; regardless of the agency's agreement to provide an administrative forum (despite a lack of legislative authority to do so) and despite the possibility that Dairylea acted as a handler in some of the transactions at issue here.

There are, furthermore, practical considerations which seem to make determination at this stage desirable. It is clear that Dairylea members proceeding individually

could seek an adjudication of the issue at the district court level. Their intervention in this case was precluded only by venue problems (see Tr., p. 83). It is, therefore, reasonable to assume that a finding of no jurisdiction here will lead not to an administrative review (which, in view of the complexities of milk price regulation, might be helpful) but to judicial review in another district. A refusal to adjudicate the issue here would then serve to further delay resolution of the issue without providing the counterbalancing benefit of an expert tribunal.

II

> "The power of the District Court in reviewing the decision of the Secretary, following his adjudicatory hearing, is not a de novo fact finding process. It is limited to a determination whether the rulings of the Secretary are in accordance with law and his findings are supported by substantial evidence. If they are, they may not be disturbed. Because there attaches to the determination of an administrative agency a presumption of the existence of facts justifying the determination, the burden of proof falls on the party challenging the validity of the agency's ruling." Lewes Dairy, Inc. v. Freeman, 401 F.2d 308, 315-'16 (3rd Cir. 1968), cert. denied, 394 U.S. 929 (1969).

This rule is equally applicable in reviewing an agency promulgation following a rule-making hearing.

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7 U.S.C. §608c(5)(B)(ii)(d) allows the Secretary to adjust prices paid to producers:

> ". . . to encourage seasonal adjustments in the production of milk through equitable apportionment of the total value of the milk purchased by any handler, or by all handlers, among producers on the basis of their marketings of milk during a representative period of time, which need not be limited to one year."

This adjustment is made in Order 4 by allocating to each producer a base equal to his Order 4 marketings between August and December and giving it reduced payments for any deliveries made during the following flush season which exceed the base amount. Producers who enter the market during the flush season are not assigned reduced rates for all of the milk which they sell in Order 4, but are given a fixed base which varies from 50% to 70%, depending upon the time of entry into the market. Established Order 4 producers have the option of choosing between the fixed percentage base and a base determined by their production record during the base-making months.

The Act provides that, after notice and hearing,

> "the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence

> introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity." 7 U.S.C. §608c(4).

Section 602(4) states the following policy:

> "Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices."

The contested provisions of Order 4 were based upon the following findings:[1]

> "(d) Seasonal incentive payment plan. The merged order should provide for the payment of producers under a 'base and excess' plan as a means of encouraging a continuing uniform level of production throughout the year.
>
> "Each of the respective orders presently provides a base-excess payment plan whereby bases are computed on deliveries in the months of July through December and are applicable for the months of March through June, except Washington, D.C., under which bases are

---

[1] Order 4 resulted from a merger of two prior regions.

applicable only for the three months of April through June. Each of the orders provides very liberal base transfer rules and, in addition, dairy farmers delivering milk to any plant which first enters the market after the beginning of any base-forming period may acquire bases computed as though such plant had been a pool plant throughout the base-forming period.

"Because of the ease with which transfers can be accomplished under the current orders and because dairy farmers can earn full bases, even though the plant to which their milk is delivered is pooled as little as a single month, there has been considerable abuse of the base-excess plan, particularly under the Delaware Valley order.

"Plants normally associated with the New York-New Jersey market (Order 2), and even the Massachusetts-Rhode Island-New Hampshire market (Order 1), have shifted regulation to the Delaware Valley order (in some instances for a single month) for the obvious purpose of acquiring bases for the dairy farmer patrons. Bases so acquired are then transferred to other producers in the Delaware Valley market. In other circumstances, deliveries from farms have been split so that only base milk is delivered to the Delaware Valley market, and what would otherwise have been excess milk is delivered as producer milk under another order. In still other circumstances, plants have shifted regulation to the Delaware Valley order during the base-operating period, which is the 'take out' period under Order 2, and have then been returned to regulation under Order 2 to participate in the 'pay back' under the Louisville plant during the fall months.

"These numerous abuses of the base plan, which in many situations were also abuses of the Louisville plan under either Order 1 or 2, have resulted in considerable discontent on the part of many producers in the Delaware Valley market.

"A proposal for a Louisville payment plan was made on behalf of the Dairymen's League Cooperative Association, Inc. (now DairyLea Cooperative, Inc.) and Northeast Dairy Cooperative Federation, Inc. Both of these organizations are major cooperatives under Order 2 and DairyLea also has substantial membership among Order 4 producers.

"Proponents' fundamental purpose in making this proposal was essentially identical with that of proponents for a 12-month base plan; i.e., to encourage a continuing even pattern of production throughout the year and to eliminate interorder shifts to plants and producers for the sole purpose of exploiting the different seasonal pricing plans. In addition, however, proponents for a Louisville plan contended that such a plan was necessary to promote more uniformity of regulation and greater price equity among producers throughout the region.

"Both the base-excess plan and the Louisville seasonal incentive pricing plan obviously can be effective in promoting a desirable seasonality of production in any particular market. Although both plans have wide acceptance, the plan provided in any particular market should be one which has the approval of a substantial majority of producers in such market. The cooperatives representing such a majority of the producers in the markets here being merged support a base-excess plan.

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"A 12-month base plan, with transfers limited to circumstances of death or discontinuance of the dairy enterprise, and with provision whereby new producers may acquire bases reflecting an equitable percentage of their monthly deliveries, was proposed by Pennmarva as the most appropriate means of insuring continuing even production.

"The base and excess plan herein adopted would establish a base for each producer by dividing his total deliveries to pool plants in the preceding months of August through December by 153 (154 in the case of a producer on every-other-day delivery and who delivered on August 1) less the number of days, if any, for which such producer's production was not received by pool handlers, but under no circumstances by less than 120. Producers would establish new bases each year. Such bases would be computed by the market administrator to be effective for the 12-month period of March 1 through February of the following year. By February 25 of each year the market administrator would notify each cooperative association with respect to the established base of each producer member and each nonmember producer with respect to his established base.

"Normally, new supply plants would be expected to enter the market only because additional milk supplies are required. Thus, there could be no need for such plants to enter the market initially in the months of flush production. Appropriately, dairy farmers associated with any supply plant entering the market should acquire bases in the identical manner as regular producers; i.e., based on their deliveries to pool plants during the base-forming months or in the alternative acquire a base in the manner hereinafter prescribed for new producers." 35 F.R. 7936, 7937 (May 22, 1970)

The Secretary's finding that selective interorder shipments had a disruptive effect upon efforts to achieve uniform production within Order 4 was supported by the Record (see, e.g., T. 717, 1233, and 1388-'89) and by marketing history in other regions.

In Zuber v. Allen, 396 U.S. 168 (1969) the Supreme Court struck down a locality differential which it found to be unsupported by findings that inhibition of the importation of outside milk was essential to market stability, holding that market differentials were only permissible.

> "[to] compensate or reward the producer for providing an economic service of benefit to the handler." Id., at 184

In Lehigh Valley Cooperative Farmers, Inc. v. United States, 370 U.S. 76 (1962), the Court struck down a system of "compensatory payments" for milk brought in by outside handlers as placing "almost insuperable trade restrictions on the entry of non-pool milk into a marketing area." It did not, however, reach the question of whether full regulation of outside handlers would be permissible under the Act. The differentials dealt with in those cases were, however, based upon that portion of the statute which provides that payments to producers shall be uniform,

subject to adjustments for

> "(c) the locations at which delivery of such milk is made." §608c(5)(B)(ii)(c).

The requirement of "economic service" which was imposed by the Court is understandable in this context.

The authorization for the base-excess plan is of a different character. In providing that the Secretary might apportion the proceeds of milk sales on the basis of a producer's marketings during a representative period, the legislature authorized the Secretary to impose a price differential in a prescribed manner and for a prescribed purpose. Since there is an economic incentive for producers to shift among the various regions to take advantage of varying "pay-out" periods, it is clear that seasonal flow within a region cannot be effectively regulated unless the Secretary has the authority to lessen that incentive. Since the historic context precludes the assumption that Congress contemplated a uniform national system, it is safe to assume that it did not intend, as plaintiffs argue, that producers be given credit in a region operating under the base-excess plan for milk marketed outside that region during the base-making period.

Absolute equality among producers is not required by Section 608c(5)(G) or by constitutional principles. In Lewes Dairy, Inc. v. Freeman, supra, the Third Circuit upheld a provision which imposed full regulation upon a handler who did business outside the marketing area, thus placing him at a competitive disadvantage vis-a-vis unregulated, outside handlers. The court noted that full regulation of the handler was necessary in order to prevent an "open end" in the regulatory scheme (which is analogous to the "open end" of inter-order shifts which threatens attempts to achieve uniform year-round production):

> ". . . unless all of the milk received in such a plant was subject to full regulation the marketing order could be rendered ineffective because 'open ends' would be left whereby the handler could pay a lower price for milk sold outside the market, reducing the average cost of the handler's total milk supply . . ." (at p. 318).

The Lewes court also relied upon the plaintiff's failure to prove, rather than merely assert, that it suffered a competitive disadvantage or that the order created a trade barrier.

In Sunny Hill Farms Dairy Co., Inc. v. Hardin, 446 F.2d 1124 (8th Cir. 1971), cert. denied, 405 U.S.

1022 (1972), the court upheld a location differential, which it found to be supported by the administrative record and in accordance with the purposes of the Act, saying, at page 1131:

> "The order does make it less profitable for Sunny Hill to sell in the St. Louis market than it would be were Sunny Hill not required to pay its producers the fifteen-cent differential. But the differential is specifically authorized by the Act and reasonable under the circumstances of the case. It thus cannot be construed as establishing an illegal trade barrier."

It has been said that

> "The requirement of substantial evidence supporting salient findings is particularly important . . . where the Secretary has chosen a broad rather than refined remedy as a means of solving the alleged problem. . . ." Fairmont Foods Co. v. Hardin, 442 F.2d 762, 771 (D.C. Cir. 1971).

In this case, the Secretary has eased the burden of base-making provisions by giving producers who have low bases, or no base at all, a substantial percentage base. This provision takes the order out of the realm of the "almost insuperable trade restriction" described by the Supreme Court in the Lehigh Valley case.

With regard to distributing plants, the Secretary made the following findings and conclusion:

> "For distributing plants, the situation is somewhat different. A change in the respective volumes of Class I route sales between markets, either by virtue of additional business or by loss of sales, can result in an unintentional shift in regulation of a plant from one order to another. It would be unreasonable, in establishing bases, to discriminate against producers delivering to such a plant. Accordingly, the order provides that when a distributing plant first becomes regulated, the market administrator shall compute bases for the producers shipping to such plant on the identical basis used in the computation of bases generally, considering the deliveries of such producers to the plant in its non-pool status as though it had been a pool plant." 35 F.R. 7937 (May 22, 1970).

Plaintiff contends that this discrimination between "supply" and "distributing" plants is unreasonable. Neither side has made a very convincing record or argument on this point, but it does appear that distributing plants, which deal in Class I route sales, are less likely to engage in the seasonal shifts which the order seeks to regulate. Furthermore, in the event of a decision upholding the balance of the scheme, the requirement of a change in the treatment of distributing plants would be of no value to plaintiff.

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For all the foregoing reasons the court is persuaded that the complaint must be dismissed.

The foregoing constitutes the court's findings of fact and conclusions of law.

SO ORDERED.

Dated: New York, New York
November 15, 1973

ROBERT L. CARTER
U.S.D.J.

Judgment and Order

U.S. DISTRICT COURT
FILED
NOV 26 1973
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

DAIRYLEA COOPERATIVE, INC., Plaintiff, : 72 Civil 4653(RLC)

: JUDGMENT

-against-

:

EARL L. BUTZ, SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF THE UNITED STATES, Defendant. :

- X

The issues in the above entitled action having been brought on regularly for trial before the Honorable Robert L. Carter, United States District Judge, on January 23 and 24, 1973, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter on November 19,1973, having handed down its opinion constituting its findings of fact and conclusions of law dismissing the complaint, it is,

ORDERED, ADJUDGED AND DECREED, that defendant, EARL L. BUTZ, SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF THE UNITED STATES, have judgment against the plaintiff, DAIRYLEA COOPERATIVE, INC., dismissing the complaint.

NOV 26 1973

Dated: New York, N. Y.
November 26, 1973

Raymond F. Burghardt
Clerk

Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

DAIRYLEA COOPERATIVE, INC.,

Plaintiff,

-against-

EARL L. BUTZ, Secretary of the Department of Agriculture of the United States,

Defendant,

PENNMARVA DAIRYMEN'S COOPERATIVE FEDERATION, INC.,

Intervenor.

----------X

File No. 72 Civ. 4653
R.L.C.

NOTICE OF APPEAL

Notice is hereby given that Dairylea Cooperative, Inc., plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 26th day of November, 1973.

Dated: December 24, 1973

BOTEIN, HAYS, SKLAR & HERZBERG

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